

**A Chaplain's Guide to Privileged Communication**

By

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The Divinity School

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This thesis examines the theological, legal, and professional issues that guide the disclosure or privileged or sensitive information by a chaplain or clergyperson. While oriented more to the military chaplain, this paper also applies to the civilian minister or priest. Within each major area (theological, legal, and professional) an ethical principle is developed, which is then applied to specific situation involving privileged communication. This work also includes an appendix of all state statutes regarding privileged communication and mandatory disclosure of child and elder abuse.

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Pro Deo Et Patria!

# **A Chaplain's Guide to Privileged Communication**

## **Introductory Scenario**

Imagine the following situation. You are a battalion chaplain.<sup>1</sup> A young noncommissioned officer and his wife (SSG Smith and wife, Joan) are in your office. They've been married for five years and have two children. They made the appointment with you because the Company Commander strongly suggested they see you. The Company Commander, CPT Horn, had heard "through the grapevine" that the relationship between SSG Smith and his wife was in trouble. Although there are no allegations of spousal abuse, SSG Smith's duty performance has been deteriorating. Further, CPT Horn was privy to rumors that SSG Smith was having an ongoing affair with a soldier in his section. CPT Horn had informed you yesterday to expect SSG Smith and his wife to make an appointment to see you. In your discussion with CPT Horn, you learn she is not so much concerned with the marital relationship between the Smiths, except to the extent that it affects his duty performance, but she certainly wants to get to the bottom of the allegations of the alleged affair. If the affair can be established as fact, CPT Horn intends to prosecute. The allegations, she says, are rampant in the unit, and have caused serious morale problems.

SSG and Mrs. Smith indeed make an appointment with you. When they arrive, they at first seem uncomfortable and question you as to why they were asked to see you. You do not disclose your conversation with CPT Horn, except to say that she thought they might benefit from having an opportunity to discuss some things with you. You then ask some peripheral questions about how their marriage is going. After about forty-

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<sup>1</sup> A battalion, commanded by a Lieutenant Colonel, is an Army unit of 2-5 companies. A company consists of about 100 soldiers, and is commanded by a Captain. Each battalion has one chaplain, also a Captain.



five minutes, Mrs. Smith begins probing her husband about some unexplained absences and expenses, and other unusual occurrences: the phone ringing, and the caller hanging-up, etc. Finally, after a battering of confrontations, SSG Smith admits to what CPT Horn and others in the unit suspected. He is indeed having an affair with PV2 Jones, a new soldier in his section. Caught in his deception, SSG Smith immediately turns contrite and humble. He states he wants to save his marriage and vows to break the relationship with PVT Jones immediately. As a wise pastoral counselor, you have your concerns about his sincerity, but you make a further appointment with SSG and Mrs. Smith to help them deal with this issue.

Fifteen minutes after the couple leaves your office, you see CPT Horn standing at your office door. She asks you the question all in the unit want to know. Is he, or is he not having an affair?

You are well aware of the Army's legal prohibition against adultery. If SSG Smith is indeed having an affair, he is committing a crime punishable under the Uniform Code of Military Justice (UCMJ). You, as a member of the unit, have also heard these rumors. Several soldiers have complained to you, as their chaplain, claiming that Jones was the newest soldier in the unit, and arrived directly from Advanced Individual Training, but was recommended for promotion to PV2 ahead of people who had been in the unit longer. These soldiers are alleging favoritism, claiming that but for her "boyfriend," as her section chief, recommending her, Jones would not have been promoted. You, as the chaplain, well understand the seriousness of allegations of such favoritism and the overwhelming morale problems caused by the rumors of this affair. You have an obligation to the soldiers of the unit to create and foster a command climate

free of favoritism. You also have an obligation as a commissioned officer to not overlook violations of the UCMJ. But, you have a pastoral relationship to the Smiths. You truly want, if they want, to save their marriage. You know, however, if actual existence of the affair became known and SSG Smith were prosecuted and confined, it would probably thwart any chance of reconciliation. You also come from a religious tradition that speaks of the sacredness of the confessional.

Now the question: do you tell CPT Horn what she wants to know? Telling her may help the unit, but hurt the Smiths. Telling her may support your oath to uphold the law, but could very well send SSG Smith to jail. Telling her may assist in bringing healing to a unit, which you value strongly, but may also violate your religious principles. Telling her may be legal, but it may not be moral. Or, it may indeed be illegal. You may indeed see, through your religious principles, adultery as immoral. You certainly see the destructive effects it is causing in the unit. Thus, on either side of the equation, you understand the enormity of this decision. You also know that you do not make such overwhelming ethical decisions in a vacuum. But you have to make this decision immediately because CPT Horn is now in front of your desk.

For an Army chaplain, this scenario is, unfortunately, common. Many in our profession have faced the same ethical problems this scenario presents. As an integral member of an Army unit, the chaplain understands that in dealing with the realities and confidences of people's lives, the answers are often complicated. The chaplain is bound by ethical problems on every side of these issues.

Therefore, in this paper, I propose to offer some insight into the theological and legal issues centering on privileged communication. I want to conduct my inquiry with a

pastoral approach. I seek to offer a framework for the chaplain to understand and think about privileged communication by balancing the care of soldiers, a duty to legal authorities, a responsibility to the profession, and faithfulness to his or her theological position. Furthermore, from this inquiry, I will propose three ethical principles which will guide the religious professional in making the right decision when faced with a problem involving privileged communication. While these principles may not answer every conceivable issue, problem, or situation, I have confidence that if they are judiciously considered and applied, the clergyperson will have a valuable resource in hand to resolve most problems of this nature.

More specifically, I shall endeavor to accomplish several tasks.

First, I want to develop a discussion from the historical understanding of the act of confession as a sacrament, and how these insights have impacted our legal and social systems. In this arena, I will show how the doctrine of confession as a sacrament has evolved. Confession as an individual act of worship, between priest and penitent, has moved to a more corporate understanding, practiced within the worshipping community. The role of the priest as one who offers or pronounces forgiveness has evolved to a pastoral counseling role, where confession of sin is understood in the larger context of behavioral issues. In developing this theological understanding, I will examine how these changing understandings are further modified in the unique ministry of the chaplaincy.

My next mission will be to examine the legal implications. What is privileged communication, and what is it not? I will frame my discussion in terms of how society values the pastoral relationship (as with the legal and medical professions) and thus, has determined the good of certain communications remaining private. In this section, I will

introduce the legal foundational basis of privileged communications, and highlight the specific exceptions. Again, after establishing a theoretical basis, I will show how the privilege is modified by the military context.

My final mission will be to address the professional implications of privileged communication. I will examine how the status of being a professional imbues certain expectations and responsibilities. Society has vested privacy in professional relationships, and as such, created a certain set of expectations in the relationship between clergy and client.

In each of these areas, I will discuss the issue from a theoretical perspective, and then apply that perspective to the chaplaincy setting. Through this application, I will derive an ethical principle to guide the professional in a decision-making process. As I want this thesis to have some definite practical applications, I will end by applying the ethical principles I develop to the introductory scenario. While I address these issues from a predominately military perspective with the hope of benefiting military chaplains, I believe this topic and discussion are germane for all ordained clergy. For this reason, I often refer in my discussion to the “clergy-client” or the “priest-penitent” relationship. I choose these terms because they occur frequently in the literature, and because they broaden my perspective to include all clergy and their parishioners. While I am writing, primarily to and for chaplains, I sincerely believe all clergy could benefit from this discussion.

## Definition of Terms

The first task is to develop a common understanding of terms. To this point, I have used the term *privileged communication* as a term to generally describe a wide range of communication between a chaplain and a soldier, or clergy and client, with the underlying assumption that there are some types of communications which ought to remain private. Indeed, as we shall see, the term, privileged communication, is one type of such communication, but it is not the only communication that carries the expectation of privacy.

The professional literature describes three types of such communication, each carrying varying degrees of the expectation to privacy. They are sacramental confession, privileged communication, and confidential information.<sup>2</sup> Each type of communication arises in the clergy-client relationship. Each has a certain, though varying expectation of privacy. Each carries the implication that what is discussed is of a profound nature, and arises only because of the relationship between the two parties. Each differs from the others, however, in that they arise in different venues and serve different purposes.

The first type of private communication is sacramental confession. Later in this thesis, I will more fully develop the history of confession as a sacrament, and its associated expectation of privacy. Here, though, it is important to realize that one essential conversation arises from a particularly religious perspective, where the person seeks the advice of the clergyperson or chaplain, not for advice or counsel or help with a particular problem, but because the clergyperson represents God. As a representative of God, the person looks to the clergyperson as a mediator to obtain God's forgiveness and

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<sup>2</sup> Dechant, Paul. *Confidentiality and the Pastoral Minister: Duty, Right, or Privilege?* The Journal of Pastoral Care, Volume 45, Number 1, Spring, 1991. Page 64.

absolution. The origin of sacramental confession is religious, and the purpose is to heal the person's relationship with God. Usually, sacramental confession concerns only the individual and the clergy, and involves the person's disclosing of behavior he or she understands as sinful. As we will see in the theological analysis, secrecy in this type of communication is decreed by the clergy's religious faith, and is considered absolute.

The second type of private communication is, properly, privileged communication. Privileged communication is a specific legal term, created in law and interpreted by the courts. It arises from a basic societal expectation that some *relationships* are inherently valuable to society, and as such, conversations arising from those relationships ought to remain private. Indeed, Paul Dechant, writing as pastoral counselor, describes his understanding of privileged communication in this way:

Privileged communication refers to a dialogue during pastoral care. The expectation of both persons is that since it is a one on one relationship, personal information can only be released with the consent of the owner of the information. In no way can a helping professional unilaterally release privileged communication. Yet these dialogues are more open to legal obligations, even allowing for the subjective nature of their content, to ensure the carrying out of justice.<sup>3</sup>

In this regard, what is *privileged* is decided on the basis of what the clergy may or may not be *legally* compelled to disclose *in a court of law*. Implicit in this definition is that the issue of privileged communication generally only arises when the person declaring the information is involved in a legal proceeding. Unlike the sacramental confession, privileged communication arises specifically from the helping relationship between the clergy, chaplain, or counselor, and the client. Integral to this communication is how the client views the relationship. As I will thoroughly explain later, the client must enter into

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<sup>3</sup> Ibid.

the relationship based on the profession of the person, and not from mere friendship. Additionally, society must place a certain value on the type of relationship the people establish. The goal of this relationship is not to achieve forgiveness of sins, but to help the client with a particular, usually legal, problem. Such a disclosure may involve the admission of sin, but usually, the admission of a crime, though it may be a symptom of a larger problem which the clergy attempts to help the person solve. The expectation to secrecy in this relationship is high – chiefly because disclosure places a person in legal peril. Only under specific legal criteria (explained below) and usually only through a court order, can privileged communication usually be disclosed.

A final type of communication where there is an expectation of privacy is sensitive or confidential information. Such information may or may not include the admission of crimes or sins, but will certainly involve the disclosure of feelings, perceptions, and opinions and relationships. Here, the information may not be as legally or morally serious as either privileged communication or sacramental confession, but it may, nonetheless, be highly personal, and therefore crucial to the client to keep private. Clearly, the focus here is on the helping aspects of the relationship. Dechant reminds us of the importance of such a relationship. He observes that the “source is a trusting pastoral relationship.”<sup>4</sup> An example of sensitive or confidential information might include a person’s health, an imminent divorce, a psychological problem, etc. The crucial way this is differentiated from the above types is that sensitive information is more subjective. It often does not deal with specific behaviors that could subject a person to prosecution, or a person confessing a sin. Nevertheless, the person discloses the information based on the trusted relationship with the clergyperson or chaplain, and with

the hope of obtaining some type of guidance or assistance. The expectation to privacy differs widely from the above types. Because the disclosure of sensitive information is more harmful to the reputation of the person than of placing the person in legal jeopardy, the cost of disclosure is not as high for society, but may be higher for the person. Sensitive information can be disclosed in the course of the helping relationship to people and institutions who are crucial to the client's goals.

Clearly, according to the Army Decision-Making Process, the first step in any analysis is to "define the problem."<sup>5</sup> The clergy offering counsel to the client needs to understand and delineate what types of information he or she is being offered. Only then can the professional know how to be responsible in dealing with such information. Indeed, these types are not discreet. Some information may overlap into each of these areas. When they overlap, what types of protections need to be observed? Based upon these definitions, then, where does the information provided by SSG and Mrs. Smith lie?

When SSG Smith finally admits of his affair, is he offering a sacramental confession? The chaplain is undoubtedly a spiritual advisor. The Smiths evidently know the chaplain functions as such. SSG and Mrs. Smith may not have initially sought the chaplain out through his role as a spiritual advisor. The Company Commander arranged for an appointment and encouraged the soldier to see the chaplain. Yet once they made their appointment and began to discuss their marriage, the relationship undoubtedly changed. SSG Smith's confession of his affair could be seen as an act of religion or conscience, or it could, more practically, be offered to get the information on the table, to facilitate his personal agenda. For example, he may have disclosed the affair as a tactical

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<sup>4</sup> Ibid.

<sup>5</sup> Field Manual 101-5. Leadership. Washington: Department of the Army, 1992. D-1.



decision, to inform his wife of the affair and his desire for a divorce, but in the context of a “protective” environment. Or, he might have chosen this venue because he believed that if he disclosed it to the chaplain, he could not be punished under the UCMJ. Or, he could understand his affair as a larger behavior issue he needs to deal with. Yet if indeed, SSG Smith’s admission was a confession of sin, the clergyperson must have some understanding of how SSG Smith views such an act of confession. Does he see, within his own religious principles, the need to confess? And if so, can this disclosure be considered a “act of religion?”<sup>6</sup>

Or, could this conversation be viewed as privileged communication? Indeed the couple eventually begins to trust the chaplain for advice, and sees the chaplain as a person who can help. Clearly, some aspects of SSG Smith’s behavior place him in legal jeopardy. He understands, however, that the chaplain cannot help him without his complete honesty. Still, he and his wife understand the relationship with the chaplain as a pastoral one, based on the profession of the chaplain, and not merely due to friendship. And clearly, even CPT Horn recognizes the value of the relationship, even though she would use the information she gained to SSG Smith’s peril. But, she knows the value and role of the chaplain. If SSG Smith were to ever confide in anyone about his affair, it would be to the chaplain.

What aspects of the conversation and relationship are attributed to sensitive information? Clearly, the entire problem of the couple’s marriage, whatever the cause, would fit under this classification. Sensitive information does not usually involve the admission of crimes or sins, and having a marital problem is certainly not a crime, and

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<sup>6</sup> Army Regulation (AR) 165-1. Chaplain Activities in the United States Army. Paragraph 4-4m.

may only sinful is a general sense. Also, the couple, by confiding in the chaplain, affirms the trust of the relationship. They perhaps see the benefit of disclosure as greater than the benefit of keeping the information entirely private. Further, SSG and Mrs. Smith most likely hold the chaplain to an expectation of privacy. Indeed, the chaplain or clergyperson is a safe venue to disclose. Yet because the chaplain may have limited skills in marriage therapy, the chaplain may deem it necessary to disclose information to other professionals, to enable him to better help the Smiths. Further, in terms of the damage Smith's affair is causing to the unit, (who is also, in a broad sense, the chaplain's client), the chaplain may indeed wrestle with the obligation to disclose a minimum amount of information necessary to bring healing to that aspect of the situation.

Clearly, then, as the chaplain analyzes the conversation with the Smiths and the varying levels of the relationship, all three types of communication are involved. In some ways, disclosure may help the situation. In other ways, it will definitely bring harm. Nevertheless, the professional must understand the types of information he or she is dealing with, and the ways they overlap and interact, in order to fully fulfil the needs of the client.

With this basic definition of terms, I now want to expand these definitions though their historical or legal context.

## **Chapter 1**

### **Confession as Sacrament – The Chaplain as Confessor**

Most scholars agree that the root or basis of privileged communications (or any type of private conversations arising from the clergy-client relationship) have, as their basis, the Roman Catholic belief of the inviolate secrecy of the confession.<sup>7</sup> Accordingly, privacy in the clergy-client relationship worked its way into Common Law. According to Roman Catholic theology, the confession, also known as the “sacrament of penance” has long existed, and has been understood to carry the strongest expectation of privacy. Although this understanding of confession continues in a somewhat different way through the Protestant Reformation, the expectation of privacy in confession, as well as a strong affirmation of clergy professionalism nonetheless survived. In this chapter, I will briefly trace the sacrament of penance through its historical manifestations.

### **Origins of the Sacrament – the Roman Catholic Tradition**

To say that the act of one person confessing their sins to the priest is a sacrament, one must define the term. According to Rahner, an act or rite defined properly as a sacrament has two essential or fundamental qualities. Sacraments are outward acts instituted by Christ, and there is a presence of grace linked to these acts.<sup>8</sup>

In this regard, the Catholic Church bases their claim of penance being instituted by Christ on two scriptures.<sup>9</sup>

For if ye forgive men their trespasses, your heavenly Father will also forgive you. But if ye forgive not men their trespasses, neither will your Father forgive your trespasses. (Matthew 6:14, 15 KJV)

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<sup>7</sup> Gumper, Lindell L. Legal Issues in the Practice of Ministry. Detroit: Harlo, 1981. Page 31.

<sup>8</sup> Rahner, Karl. The Teachings of the Catholic Church. New York: Pauline Fathers, 1966. Page 254.

<sup>9</sup> Ibid, page 311.

In this scripture, the Church finds the necessity to forgive, and God's willingness to forgive. Who, though, is entitled to mediate this forgiveness?

Then said Jesus to them (the disciples) again, "Peace be unto you: as my Father hath sent me, even so send I you." And when he had said this, he breathed on them, and saith unto them, "Receive ye the Holy Ghost: Whose soever sins ye remit, they are remitted unto them; and whose soever sins ye retain, they are retained." (John 20:21, 22 KJV)

In these combined scriptures, the Church found a linkage to the need and efficacy of forgiveness to the ministry of the disciples. Assuming the Roman Catholic doctrine of the primacy of the apostles, manifested in their succession through bishops and priests, the church found the apostles, and consequently, priests, as the vehicle for mediating the forgiveness God offers. Thus, two aspects of penance as a sacrament are evident here: through the act of confession, Christ instituted and promises forgiveness. Furthermore, Christ directly commissioned the apostles, and subsequently, priests, to become mediators of this forgiveness.

With regard to Rahner's second fundamental quality of a sacrament, the presence of grace, he considers their effects. He writes:

A sacrament, administered properly in the way established by Christ and with the proper intention, gives the grace it signifies. It is effective not by reason of the power of intercession of priestly prayer nor on account of the worthiness of the recipient, by solely by the power of Christ.<sup>10</sup>

From this quote, it is evident that the power, or grace, of the sacrament comes directly from Christ. While the priestly function of the clergy is to administer the sacrament, the priest does so as a representative of Christ, or, more precisely, as Christ. The priest's own worthiness or intercession is of no effect for the sacrament to be valid. Indeed, only

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<sup>10</sup> Ibid, page 254.

through the “office” of the priest can the sacrament administered. Similarly, the worthiness of the recipient is also inconsequential. The person does not earn the benefits of the sacrament by his or her own work. Instead, the sacrament is entirely God’s gift. Therefore, the person does not earn forgiveness.

Therefore, penance is a sacrament is instituted by Christ, administered by persons “ordained” by Christ (without regard to their personal qualities) and bestowed as a grace of Christ.

Although official Church documents are sparse, apparently this understanding of the sacrament of penance, as a developed ritual, was normative. Craig Nesson reminds us, though, that the early church practiced a more public confession until about the 4<sup>th</sup> century. By the 6<sup>th</sup> century, such public confession was replaced by the practice we are familiar with today.<sup>11</sup> By the 13<sup>th</sup> century, the 4th Lateran Council (1215) codified the sacrament of penance.<sup>12</sup> This Council also stipulated the absolute privacy of the confessional and established sanctions against any priest who violated it:

Let him guard with greatest care against exposing the sinner even slightly by word or sign or in any other way. But if he should need wiser advice, let him ask for it cautiously, without any mention of the person, for if anyone dares to reveal a sin uncovered to him in the place of confession, we decree that he not only be deposed from the office of priest, but also be dispatched to a monastery of strict discipline to do penance for the rest of his life.<sup>13</sup>

This understanding of the sacrament of penance, within the Roman Catholic tradition, continues unchanged through generations. The current canon addressing the sanctity of

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<sup>11</sup> Nesson, Craig L. *Confidentiality: Sacred Trust and Ethical Quagmire* The Journal of Pastoral Care, Volume 52, Number 4, Winter, 1998. Page 351.

<sup>12</sup> Ibid.

<sup>13</sup> Leith, John H. Creeds of the Churches: A Reader in Christian Doctrine from the Bible to the Present Atlanta: John Knox Press, 1977. Page 59.

the confessional illustrates this: “The sacramental seal is inviolable. Accordingly, it is absolutely wrong for a confessor in any way to betray the penitent, for any reason whatsoever, whether by word or any other fashion.”<sup>14</sup> In this understanding of confession as a sacrament, specificity of sin is required. One cannot disclose or confess the sins of another, but is accountable only for his or her own sins. There is no understanding, in this sacramental sense, of confessing general sinfulness. As Chaplain (CPT) Terrence Walsh writes from his Lutheran perspective: “Christians can only hear the assurance of pardon for *particular* sins when they confess *particular* sins.”<sup>15</sup> Furthermore, the seal of confession is so inviolate that once a penitent discloses such a particular sin to a priest, it is not to be discussed under any circumstances, including subsequent opportunities of confession.

### **The Evolving Thought of the Reformed Traditions**

The reformations in both the Church of England and through Martin Luther brought changes to the penance as a sacrament. The Church of England wrestled with Rome on the number of sacraments. In 1660, John Cosin, Bishop of Durham, opined that the Church of England differed with Rome, in that the former acknowledged only two sacraments, Baptism and Eucharist.<sup>16</sup> While penance or confession, as a sacrament, was not recognized, the act itself still contained great power and importance. Cosin writes:

The Church of England, howsoever it holdeth not Confession and Absolution Sacramental that is made unto and received from a priest to be absolutely necessary, as without it there can be so no remission of sins, yet

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<sup>14</sup> The Code of Canon Law. London: Collins, 1983, Canon 983, Number 1, page 177.

<sup>15</sup> Walsh, Terrence M. Shepherding in the Minefield: The Military Chaplain, Privileged Communication, and Pastoral Confidentiality. Th.M. Thesis. Louisville: Louisville Presbyterian Theological Seminary, 2000. Page 5.

<sup>16</sup> Bettenson, Henry. Documents of the Christian Church. New York: Oxford University Press, 1978. Page 303.

by this place it is manifest what she teacheth concerning the virtue and force of this sacred action. The Confession is commanded to be special. The Absolution is the same that the ancient Church and the present Church of Rome useth. The truth is, that in the priest's Absolution there is the true power and virtue of forgiveness, which will most certainly take effect ... as in Baptism.<sup>17</sup>

While the English Church did not accept the definition and power associated with penance as a sacrament, it still saw the act as beneficial, and a way to receive forgiveness through the grace of Christ. More important to our discussion, however, is the Church of England placed a great emphasis on the power of the priest in dispensing of that grace.

### **Lutheran Transformations**

The greatest transformation in our understanding of the sacrament of penance came through Martin Luther's teachings. Martin Luther valued the act of privately confessing sins, but he saw the act in quite different terms than of the Roman Church. He believed in the good of the confession of sins: "it seems a highly satisfactory practice to me; it is useful and even necessary."<sup>18</sup> He differed, though, on the actual practice. Luther based his belief in the necessity of confession on his reading of Matthew 18:15ff, where Jesus taught that one should reprove a sinning brother or sister, before taking the matter to the church.<sup>19</sup> Here, Luther was concerned with church discipline: how Christians ought to behave with, and have responsibility for each other. But at a deeper level, Luther was repudiating the connection between the sacrament of confession and the

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<sup>17</sup> Ibid, page 310.

<sup>18</sup> Dillenberger, John. Martin Luther – Selections From His Writings. New York: Doubleday, 1962. Page 319.

<sup>19</sup> Ibid.

receiving of indulgences. In several of his Ninety-Five Theses, his understanding is clear:

1. Our Lord and Master Jesus Christ, in saying ‘Repent ye, etc.,’ meant the whole life of the faithful to be an act of repentance.
2. This saying cannot be understood of the sacrament of penance (i.e. of confession and absolution) which is administered by the priesthood.
7. God does not remit the guilt of any without subjecting him to be humbled in all respects before the priest, God’s vicar.<sup>20</sup>

For Luther, one’s entire life, not one’s singular confession, was to be an act of repentance. Yet Luther was also concerned with another aspect of Rome’s teaching. He wrote vehemently against the practice of “reserving of sins” which he called “a means of oppression and extortion on the part of the pontiffs.”<sup>21</sup> Under this practice, certain bishops would “reserve” the prerogative of hearing the confession of certain sins, and leaving the rest for the priest. Thus, the bishop hearing the confession of these particular sins had the power to specify pilgrimages, indulgences, or certain great works to the sinner to earn forgiveness. Luther rejected this practice for two reasons. First, from a more theological perspective, this practice created a “works-righteousness” salvation, which was completely opposite from Luther’s understanding of justification by faith.

Second, more practically, this practice denied Luther’s belief that all Christians are essentially equal in God’s sight. If equal, then each Christian was able to hear, and thus pronounce the forgiveness of sins: “No matter how much any pope may rage at these contentions, the fact is that Christ manifestly gave the power of pronouncing forgiveness to anyone who had faith in him.”<sup>22</sup> In Luther’s view, such practices should not be reserved to the prerogative of the clergy.

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<sup>20</sup> Bettenson, page 186.

<sup>21</sup> Dillenberger, Martin Luther – Selections From His Writings. Page 319.

<sup>22</sup> Ibid, page 321.



Luther, then, believed in the good of confession. He believed, however, that inherent in a person's being a Christian, he or she had the power to hear the confessions of a brother or sister in Christ. He also believed that such confessions contained a requirement for privacy: "If we lay bare to a brother what lies in our conscience, and in confidence we unveil that which we have kept hidden, we receive, through the mouth of the brother, a comfort which God has spoken."<sup>23</sup>

### **John Calvin's Thought**

John Calvin continues the theme of a reduced sacramental nature of penance and a different role of the priesthood. Calvin, like Luther, saw the good of confession as it pertained to church discipline. Yet he ascribed to elders, and not pastors, the duty of the "oversight of everyone, to admonish amicably those who they see to be erring or living a disordered life."<sup>24</sup> Calvin, then, was concerned about sin, but more in terms of the Church remaining pure. Indeed, he amplifies this concern by itemizing the sins he considered intolerable among pastors: "lewdness, larceny, drunkenness, assault."<sup>25</sup> Calvin believed such violations disrupted the church, and as such, the Siegneury should impose discipline.<sup>26</sup>

Calvin omits penance as one of the essential sacraments the Church is to observe. Indeed, while he seemed to believe that confession was good and proper, he did not understand it as possessing any special powers. He believed that confession as a required

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<sup>23</sup> Ibid, page 319.

<sup>24</sup> Dillenberger, John. John Calvin – Selections From His Writings. New York: Scholars Press, 1975. Page 235.

<sup>25</sup> Ibid, page 232.

<sup>26</sup> Ibid.

act, was “a discipline of polity laid down by the bishops, and not a law of Christ.”<sup>27</sup> To confess, singularly, before a priest offered the individual an expedient, but quite uncertain forgiveness:

For it requires every individual to confess all his sins once a year to his own priest; if this be not done, it leaves him no hope of pardon. Those who have made a serious attempt ... have found it impossible thus to do even a hundredth part of it. For, thinking they obtained an acquittal at the bar of God, as soon as they divulged their sins into the ear of a priest, they were bold to sin more freely, since they were disburdened in such an expeditious way.<sup>28</sup>

Calvin nonetheless, reserved a practical necessity for confession and penance. He found in scripture confession as necessary: “For, in Scripture, one way of confession is prescribed to this effect: since it is the Lord who forgives, forgets, and wipes out, sins, let us confess our sins to him in order to obtain pardon.”<sup>29</sup> In this regard, Calvin sees two modes of confession. First, he sees confession as a public act. Confession should be practiced, or accomplished, in the congregation, as a way to build a sense of corporate community:

For since in every sacred assembly we stand before the sight of God and the angels, what other beginning of our action will there be then the recognition of our own unworthiness? You will agree with me that it would be a salutary regulation if the Christian people were to practice humbling themselves through some public rite of confession ... and indeed, we see this custom observed with good result in well-regulated churches: that every Lord’s day, the minister frames the formula of confession in his own and the peoples’ name, and by it he accuses all the wickedness and implores pardon from the Lord.<sup>30</sup>

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<sup>27</sup> Calvin, John. Institutes of the Christian Religion. III, IV 7.

<sup>28</sup> Dudley, Martin. Confession and Absolution. London: Holy Trinity Church, 1990. Page 70.

<sup>29</sup> Institutes, III, IV, 9.

<sup>30</sup> Institutes, III, IV, 11.

Calvin maintains, interestingly, a second mode of confession, emphasizing the role of pastor as one who is called to care for the flock:

Scripture, moreover, approves two forms of private confession: one made for our own sake, to which the statement of James refers that we should confess our sins to one another. And, in the first kind of confession, even though James ... leaves us free choice to confess to that one of the flock of the church who seems most suitable ...yet we must also preferably choose pastors inasmuch as they should be judged especially qualified above the rest ... because the Lord has appointed them by the very calling of the ministry to instruct us by word of mouth to overcome and correct our sins ... and also to give us consolation through assurance of pardon.<sup>31</sup>

Calvin does not see the pastor's role as an intermediary between a sinner and God, as much as he sees the practical role of offering care. Confession to a priest was not necessary for salvation. The act of confession, however, brought healing to the Christian, whether it was made before another Christian, to a pastor, or in front of the entire community. Confession also brought healing to the entire Christian community.

Thus, by Calvin's time, the idea of confession as a sacrament, as worship rite, continued to decline. Public confession of sins, particularly of a general nature, and more concerned with church discipline and order, began to rule. Further, as the power of priest as one who pronounced forgiveness diminished, the pastoral role of the clergy in offering advice, guidance and reconciliation began to emerge.

In this light, Martin Dudley is particularly insightful. He describes confession as a sacrament because it is "focused, specific, individual, and concrete."<sup>32</sup> As the Reformation movement diluted these essential qualities, the sacramental nature of confession diminished. With confession becoming less of a sacrament, and confession

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<sup>31</sup> *Institutes*, III, IV, 12.

<sup>32</sup> Dudley, page 4.

becoming less “specific and concrete,” the office of priest changed from a sacramental role to a pastoral role.

### **Confession in Free Church Traditions**

The act of confession in the various Free Church traditions further marks this transition. The Free Churches focus on a more individual sense of piety, a diminished understanding of sacrament, and a marked increase in the concern for church order and discipline.

Consider the Anabaptist tradition: In the Schleithem Confession, the Church ordained certain articles of faith and discipline within the Church. Among those was “The Ban.” Although the Anabaptists could not be considered a heterogeneous group, this document is representative of the normative, shared beliefs of various Anabaptist and Mennonite groups.

The ban shall be employed with all those who have given themselves to the Lord, to walk in His commandments, and with all those who are baptized into the one body of Christ and who are called brethren or sisters, and yet who slip sometimes and fall into error and sin, being inadvertently overtaken. The same shall be admonished twice in secret, and the third time openly disciplined, or banned according to the command of Christ. Matthew 18.<sup>33</sup>

But the pastor maintained a significant role in the act. The pastor bore responsibility for the discipline of the Church and maintained a strong teaching and counseling responsibility. The Pastor was:

to read, to admonish and teach, to warn, to discipline, to ban in the church, to lead out in prayer for the advancement of all the brethren and sisters, to

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<sup>33</sup> Wenger, John C. *The Schleithem Confession of Faith*. Mennonite Quarterly Review, 18 (1945). Pages 243ff.

lift up the bread when it is to be broken, and in all the things to see to the care of the body of Christ, in order that it may be built up and developed.<sup>34</sup>

While Anabaptist theology also broke with the Roman Catholic view of confession as a sacrament, it nonetheless retained some sense of privacy. Pastoral admonitions were to be done in secret unless the sinner refused to repent. In those extreme cases where the sinner refused to repent, the matter was brought public – either to reconcile the errant one to the congregation, or to be dismissed from the fellowship.

Similarly, the Wesleyan (Methodist) view saw confession as a corporate act. Wesley did not understand confession or penance as a singular sacrament but incorporated it into worship. Wesley's view of the work of grace informed his belief in the necessity of confession and absolution. For Wesley, holiness was a process, begun at Baptism. Hence, there can be no sense of penance and absolution apart from a life that was evidence of it. Thus, William Wade quotes Wesley:

We believe the absolution pronounced by a priest is only declarative and conditional. For judicially to pardon sin and absolve the sinner is a power God has reserved for himself.<sup>35</sup>

The Wesleyan tradition did not understand confession as a separate act. Indeed, one was to practice, or live a life of perpetual confession, similar to how Wesley understood the idea of a “constant communion.”<sup>36</sup> Thus, the acts of confession and absolution were tied to the sacrament of the Eucharist. They were practiced in the context of public worship, as general acts of confession and declarations of pardon, as a preparation to receive the Eucharist.

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<sup>34</sup> Ibid.

<sup>35</sup> Wade, William N. A History of Public Worship in the Methodist Episcopal Church Ph.D. Dissertation. South Bend: University of Notre Dame, 1981. Page 29.

### **Current Denominational Stances**

Although, above, I have attempted to provide a brief history of the penance and confession as a sacrament, and thus carrying an expectation for privacy, it is evident that this view is changing, particularly among the Protestant traditions. While a full explanation of all the reasons for these changes is beyond the scope of this thesis, I venture to say that the greatest reason was the idea, in Protestantism, that each person is directly and personally accountable before God. Thus, while the necessity of confession remains, the venue in which it occurs has radically changed: it moved from the priest, to the congregation, to the heart.

Yet where are we today? Now, I would like to provide some examples from the canons of the major American traditions, concerning their current view of penance.

The Roman Catholic tradition of penance has remained virtually unchanged. Confession is still required for admission to the Eucharist, must still be performed by the priest, and continues to carry the strong expectation of privacy. Provided below are excerpts from current Canon Law:

Can. 959. In the sacrament of penance the faithful who confess their sins to a lawful minister, are sorry for those sins and have a purpose of amendment, receive from God, through the absolution given by that minister, forgiveness of sins they have committed after baptism, and at the same time they are reconciled with the Church, which by sinning they wounded.

Can. 960. Individual and integral confession and absolution constitute the sole ordinary means by which a member of the faithful who is conscious of grave sin is reconciled with God and with the Church. Physical or moral impossibility alone excuses from such confession, in which case reconciliation may be attained by other means also.

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<sup>36</sup> Parris, John R. John Wesley's Doctrine of the Sacraments. London: Epworth Press, 1963. Page 87.

Can. 965. Only a priest is the minister of the sacrament of penance.

Can. 978 §1. In hearing confessions the priest is to remember that he is at once both judge and healer, and that he is constituted by God as a minister of both divine justice and divine mercy, so that he may contribute to the honour of God and the salvation of souls.

Can. 983 §1. The sacramental seal is inviolable. Accordingly, it is absolutely wrong for a confessor in any way to betray the penitent, for any reason whatsoever, whether by word or in any other fashion.

§2 An interpreter, if there is one, is also obliged to observe this secret, as are all others who in any way whatever have come to a knowledge of sins from a confession.<sup>37</sup>

These excerpts highlight another aspect of confession: the role of the priest as a “judge and healer.”<sup>38</sup> The priest hearing the confession is seen by the penitent as one who communicates divine mercy. Even apart from the actual declaration of forgiveness, the person perceives a special relationship with the priest.

The Anglican perspective, while originally similar to the Roman Catholic understanding, provides a definite transition. This transition is particularly noted in the role of priest, moving from being a confessor (one who mediates God’s forgiveness) and one who offers pastoral care. John Gunstone in The Liturgy of Penance illustrates this transition:

Although the lack of a common discipline and canonical directions about private penance has its disadvantages, this has to be set against the free and fruitful relationship between the confessor and penitent which is a characteristic of Anglicanism. The liturgy of penance has become a purely pastoral instrument of individual care.<sup>39</sup>

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<sup>37</sup> The Code of Canon Law. Online edition. ( <http://www.prairienet.org/nrpcatholic/cicmenu.html>)

<sup>38</sup> Ibid, Canon 978.

<sup>39</sup> Gunstone, John. The Liturgy of Penance. London: The Faith Press, 1966. Page 75.

An additional transition is also evident: a movement away from a private confessional to a public act. The 1979 Book of Common Prayer is illustrative:

The ministry of reconciliation, which has been committed by Christ to his Church, is exercised through the care each Christian has for others, through the common prayer of Christians assembled for public worship and through the priesthood of the Church and its ministers declaring absolution.<sup>40</sup>

Furthermore, the Book of Common Prayer continues, by addressing the role of the priest:

“[when] the penitent has confessed all serious sins troubling the conscience, and has given evidence of due contrition, the priest gives such encouragement and counsel as needed.”<sup>41</sup>

Therefore, today’s Episcopal understanding continues to provide a strong element of clergy participation, though that participation evolves into the realm of pastoral care. In this regard, the church moves toward a more Protestant understanding, and away from its Catholic roots. Additionally, the church moves toward the Protestant understanding in another major way: confession becomes clearly established in a public venue. Thus, Clark Hyde writes: “The Sacrament of Penance is, in one sense, ministered by the whole Church, the priestly people who call men and women to penance by preaching the word and interceding for them.”<sup>42</sup> While church canons do not make a statement about discipline of clergy who violate the secrecy of confession, they do provide for discipline for violating “vows of ordination,”<sup>43</sup> and “conduct unbecoming of clergy.”<sup>44</sup> One can surmise, then, that the disclosure of a confidence is a grave transgression of tradition.

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<sup>40</sup> Book of Common Prayer of the Protestant Episcopal Church. New York: The Church Hymnal Corporation, 1976. Page 446.

<sup>41</sup> Ibid.

<sup>42</sup> Hyde, page 37.

<sup>43</sup> Canon Law of the Protestant Episcopal Church. Online edition (www.ecusa.anglican.org/governance/canon). Canon IV, 1h.



Among American Free Church Protestants the act of confession has remained a more corporate act of worship. Similarly, the role of priest has evolved into a more pastoral role. Interestingly, however, as examples, the United Methodist Church and the Presbyterian Church, USA, both, in their legal documents, also consider the act of confession as inviolate. For example, the United Methodist Book of Discipline declares that maintaining a confidence is one duty required for ordained ministers, and where a violation can bring censure:

Ordained ministers of the United Methodist Church are charged to maintain all confidences inviolate, including confessional confidences.<sup>45</sup>

Similarly, the Presbyterian Church, USA, Book of Order does not describe the act of confession as a sacrament, but stipulates:

In the exercise of pastoral care, ministers of the Word and Sacrament shall maintain a relationship of trust and confidentiality, and shall hold in confidence all the information revealed to them in the course of providing such care. When the person whose confidences are at issue gives express consent to reveal confidential information, then a minister of Word and Sacrament may, but cannot be compelled to reveal confidential information. A minister of Word and Sacrament may reveal confidential information when he or she reasonably believes that there is risk of imminent bodily harm.<sup>46</sup>

In commentary related to this order, the Presbyterian position is explained: “Ministers of Word and Sacrament are called upon to care for the souls of people and to provide a ministry of caring, healing, and redemption to all those in need.”<sup>47</sup> In both the Presbyterian and United Methodist positions, there seems to be (although not stated) a

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<sup>44</sup> Ibid, IV, 1j.

<sup>45</sup> The Book of Discipline of the United Methodist Church Nashville: The United Methodist Publishing House, 1992. Paragraph 440.05.

<sup>46</sup> Presbyterian Book of Order. CD ROM edition, 1998. Paragraph G-6.0204.

<sup>47</sup> Ibid.

connection between the sacredness of confession and the clergy's duty of providing pastoral care. Further, particularly in the Presbyterian position, reading their full commentary suggests that they are strongly influenced by the legal issues of privileged communication. These traditions, therefore, share at least one theme with their Roman Catholic counterparts: the theme that there is a trust relationship between priest and penitent. All Protestant views of confession break with Roman Catholic tradition in a decided way: the priest becomes a powerful counseling ally, and less powerful as a channel of God's sacramental grace.

### **Chaplaincy Nuances**

The Army chaplaincy cannot, as a body, lay a claim to a particular historical or theological understanding of confession. Indeed, chaplains in the Army represent many denominations and faith groups. Most chaplains, however, can be classified into the usual Protestant (Baptist, Methodist, and Presbyterian) and Roman Catholic categories. For example, the current strength as of 1 November 2000, indicates a balance of 1173 Protestant and 100 Roman Catholic chaplains. Roman Catholics comprise 7% of the Army chaplaincy.<sup>48</sup> Beyond the issue of numbers, actual practice among chaplains varies. According to Army Regulation 165-1, an Army chaplain endorsed by a particular denomination, is required to uphold and maintain the tenets of his or her faith or denomination, and cannot be compelled to violate those tenets.<sup>49</sup> Therefore, to derive a common belief, rooted in a common theology and tradition, and then to expect compliance to a common practice, is impossible. With this lack of a common

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<sup>48</sup> Source: Office of the Chief of Chaplains.

<sup>49</sup> AR 165-1. Paragraph 4-4.

framework, the actual practice of confession (and the expectation for privacy) varies considerably. Indeed, this is one motivation for writing this paper – to try to develop an ethical principle in spite of the lack of a theological framework. Without such a basis, how can we provide our soldiers with a common, uniform standard of care?

Yet if the chaplaincy is overwhelmingly diverse in its theological understandings of confession, the Army population, in general, shares this diversity, but not in the same stark terms. According to the Office of the Chief of Chaplains, the current Army population consists of 41.3% Protestant and 21.19% Roman Catholic soldiers, of those who identify a religious preference. The remainder, 36%, includes all other faith groups, as well as those who profess no religious preference.<sup>50</sup>

I offer these numbers to make a couple of observations. The act of confession contains a strong element of trust between the priest and penitent. The expectation of secrecy is one element of how that trust is expressed. Yet trust is contingent on the common assumptions shared between priest and penitent. In a particular denomination or faith group, such common assumptions are expected. In the Army however, just by the numbers of faiths represented, there can be no such basis for such common assumptions. However, given this significant level of Catholicism among soldiers, one would expect that soldiers would hold to the understandings of sacrament and inviolate privacy in the confessional. Chaplains, however, significantly more Protestant, see confession more from a pastoral care model, and confession, per se, is more public and general. It is interesting, however, that 64% of the Army population identifies with a particular religious tradition. Therefore, one would expect soldiers to understand the role of chaplain, as they undoubtedly understand the role of minister, priest, or rabbi.

## **Analysis and Principle**

In the preceding sections, I have attempted to demonstrate how the dual ideas of sacrament and the role of the priest have changed through the act of penance. Penance, except in the Roman Catholic tradition, has become less of a sacrament and more of a corporate act of worship. The priest or clergyman is no longer seen as a channel of God's grace, but more as a counselor, where the personal relationship between the two people is paramount.

As each tradition modified the initial understanding of confession as a sacrament, have they caused a problem to our consideration of the sacramental nature of clergy-client communications? Indeed, by reducing its sacramental nature and placing the act of confession into the hands of any Christian or to the congregation, these evolving views may prove difficult in justifying the clergy's role in privileged communications. If clergy are not necessary, can any special privilege or expectation to privacy exist? Further, because of this corporate nature, few people may actually exercise their right to privately confess. As this sacramental nature has diminished, many people, while wanting the benefit of forgiveness, see it as an entirely private matter – confession occurs in the heart and never reaches the clergy's ears.

Has the role of priest caused a problem in this issue? Indeed, as we have seen, few view the clergy as a medium of grace – they see clergy as trusted professionals. They enter the relationship for more for guidance than for forgiveness. In this sense, a person may indeed confess sins or crimes to their clergy person, but usually in the context of greater problems.

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<sup>50</sup> Source: Chaplain Terry (LTC) Bradfield, Office of the Chief of Chaplains.

In short, confession is much different today than how it originated. The expectation to privacy, based on the premise that a person confessed to “come clean” before God, has also changed: now, since confession occurs in the context of larger personal issues, a person expects privacy more for legal reasons, than for absolution.

Yet within these changing understandings and roles, there remains one vital component – a component that transcends denomination or ministry setting, and a component that is vital in deriving an ethical principle for our discussion. Regardless of faith or setting, *there remains a critical power of the clergy as representing God.* Whether the person seeks the clergy’s assistance to obtain forgiveness or advice, the person who seeks the clergy does so because he or she esteems the calling of the clergy. In some senses, people attribute this power because they perceive the clergy has a special relationship with God. Confession becomes cathartic. For others, especially in a diverse world where there is a theological dissonance between clergy and penitent, this power may reside in the clergy’s wisdom and professional experience. Regardless of why the person attributes this power, the clergy remain in the ministry of hearing confessions of sins. Because of this power, the clergy has the opportunity to use this power for the healing and cure of souls.

Yet with this power comes responsibility. SSG Smith, for example, feels safety in confessing his affair to the chaplain. Whether he is Roman Catholic, Pentecostal, or entirely un-religious, he makes certain assumptions about the role of the chaplain as representing God. These assumptions create a feeling of assurance and confidence. Similarly, people who see “the collar” make certain assumptions. Thus, regardless of denomination or faith, people expect assurance and confidence in the pastoral

relationship, and this assurance is made evident in a person willing to discuss their most intimate lives.

Thus, this discussion of confession as sacrament ends with this first of three ethical principles, which can be applied to the introductory problem:

**As the office of clergy represents power, those who occupy that office must exercise that power responsibly. In this ethical principle, the source of this power derives from the clergy's relationship with God. The clergy seeks to proclaim the word of God in hearing the concerns of people.**

People confess to the clergy because they perceive safety in confession. They also confess because they believe the clergy represent God, and thus, can pronounce, or give, or proclaim forgiveness. Because of this power, the clergyperson must realize that people are placing a sacred trust in the relationship: the relationship not only to with the clergyperson, but with God, through the clergyperson. Yet consider the term, *responsibly*. The clergy person has the power to use the act of confession in furthering God's forgiving grace – which includes both proclaiming God's forgiveness and holding people accountable for their lives and decisions. As I will explain in the summary of this thesis, the responsible use of the power of confession can be creatively applied.

## Chapter 2

### Privileged Communication Under Law – The Chaplain as Counselor

The second type of communication with an expectation to privacy is “privileged communication.” Privileged communication is a legal term, referring only to those communications arising out of a professional relationship which society has determined, through either Common Law or legal statute, ought to remain private. While this chapter is mostly a discussion of the legal issues involved, I would like to state from the outset that this privilege is somewhat of a merger of legal and theological concerns.

The professions of theology and law are two of the oldest professions. Most interesting for this study is that the vital concerns of these two professions become inexorably wed in the concept of privileged communications. While this legal privilege has its basis in both English and American Common Law, the more basic root can be found in the Church-State relationship. As the English Church and State were institutionally one, and as the act of confession was a sacrament of the Church in both Catholic and later Anglican England, the doctrine of a legal privilege against disclosure of the confessional arose. In essence, the State incorporated sacrament into the body of law. In this section, I want to *briefly* discuss privileged communication’s historical origins under common law. Then, I want to provide, more by fact and less by interpretation, the current status of the privilege under law. Then, I will turn to Chaplaincy implications and derive my second ethical principle. Here, though, I must note that for the remainder of this thesis I will use the term “privileged communications” in its specifically legal meaning, referring to a certain class of communications that are immune from judicial inquiry.

## English Origins of the Privilege

As introduced above, the origin of the concept of private communications between priest and penitent or clergy and client has its basis in English Common Law, and Common Law has its basis in the relationship between the English Church and State.<sup>51</sup> Common Law, succinctly defined is:

... that body of law and juristic theory which was originated, developed, and formulated, and is administered in England, and had obtained among most of the states and peoples of Anglo-Saxon stock. As distinguished from law created by the enactment of legislatures, common law comprises the body of those principles and rules of action ... which derive their authority solely from usages and customs of immemorial antiquity.<sup>52</sup>

Bush and Tiemann remind us that the original beginnings of privileged communications arose prior to the Norman Conquest of 1066.<sup>53</sup> England, under the Roman Catholic Church, understood the inviolate sanctity of the confessional, and thus incorporated this sanctity into its legal code. The first legislative articulation of the privilege was the *Articuli Cleri*, an act of the English Parliament in 1315: “And the King’s pleasure is that thieves or appellors may confess their offenses to priests, but let the confessors beware that they do not erroneously inform such appellors.”<sup>54</sup> This understanding of the privilege remained virtually unchanged, except that Sir Edward Coke, Attorney General, modified it under Anglican England, to apply to all crimes except treason.<sup>55</sup> Apparently, this exception was created for political reasons. The social good would not be served through treason, and thus priests were obliged to inform the authorities on those confessions that posed a risk to the state.

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<sup>51</sup> Bush, John C. and Tiemann, William H. The Right To Silence: Privileged Clergy Communication and the Law. Nashville: Abington, 1989. Page 49.

<sup>52</sup> Ibid, page 96.

<sup>53</sup> Ibid, page 54.



### **The Privilege in American Jurisprudence**

It is not surprising that, as colonies of the British Crown, American law would model itself on its English roots. Indeed, the concept of privileged communication became firmly entrenched in American Common Law. Referring back to the definition of Common Law above, American Common Law is:

As concerning its force and authority in the United States, the phrase designates that portion of the Common Law of England, which had been adopted and was in force here at the time of the Revolution.<sup>56</sup>

Thus, there was a predisposition in American jurisprudence to maintain a priest-penitent privilege. Indeed, original American Common Law recognized two initial forms of privileged communication: the attorney-client privilege and the husband-wife privilege.<sup>57</sup> American courts, however, moved away from appealing to Common Law as the basis of privilege, and have increasingly ruled that such privileged relationships exist only through their creation by statute.<sup>58</sup> In this regard, these two initial privileged relationships were incorporated into statute law, as well as two additional others: the physician-patient privilege and the clergy-client privilege.<sup>59</sup>

### **The Privilege and Its Rationale**

As stated above, privileged communication is a legally defined class of confidential communication which is immune from court testimony. Such communications are described in this way:

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<sup>54</sup> Ibid, page 52.

<sup>55</sup> Ibid.

<sup>56</sup> Ibid, page 96.

<sup>57</sup> Ibid, page 99.

<sup>58</sup> Ibid, page 98.

<sup>59</sup> Ibid, page 99.

Confidential Communications. Certain classes of communications, passing between persons in a confidential or fiduciary relationship to each other (or who, on account of the their relative situation, are under a special duty of secrecy or fidelity), which the law will not permit to be divulged, or allow to them to be inquired into in a court of justice, for the sake of the public policy and for the good order of society. The phrase describes only secret communications, the secrecy being enjoined either actually or by implication, and so does not include communications made for the purpose, or with the expectation of being disclosed, or those made in the presence of others.<sup>60</sup>

Furthermore, Bush and Tiemann define privileged communications in this way:

The term “privileged communications” has reference to communications made during the existence of certain confidential relationships recognized by the law and not competent to be produced in court during the trial of a case.<sup>61</sup>

The mere expectation to privacy is not sufficient to claim the privilege. Just because a person has a private conversation with another, and intends the conversation to remain secret, the person has no legal right for privacy. The relationship between the individuals is crucial. Tiemann writes:

The mere fact that a communication is regarded as confidential does not render it privileged in a legal sense ... when the parties stand in no relation which the law considers confidential, a witness cannot be excused or prevented from testifying.<sup>62</sup>

Furthermore, the privilege, according to Black, is a “testimonial privilege,” which is “a right not to testify based on a claim of privilege.”<sup>63</sup> Privileged communication, then, only includes disclosures that are not admissible in a court of law.

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<sup>60</sup> Ludes, Francis J and Gilbert, Harold J. Corpus Juris Secundum. Brooklyn: The American Law Book Company, 1967. Volume 15A, page 85.

<sup>61</sup> Bush and Tiemann, page 98.

<sup>62</sup> Ibid.

<sup>63</sup> Garner, Bryan A. Black’s Law Dictionary (Seventh Edition). St. Paul: West Group, 1990. Page 1215.

The privilege only exists because the one to whom the disclosure is made has established a particular relationship to the person making the disclosure. This relationship is such, because society has determined that some relationships have inherent value to society as a whole, and thus, the good provided by the sanctity of those relationships serve the entire society. Or, on the opposite side of the ledger, society would be harmed more by the act of disclosure than by the substance of that which was disclosed.

As an analogy, consider one of the first privileges to arise under Common Law: the husband-wife privilege. Society values the marriage relationship because it creates order and stability in general. Open and honest communication between the partners of a marriage fosters trust, and therefore contributes to this order and stability. Mistrust or suspicion in a marriage fractures the relationship, and thus leads to the destruction of society. When the legal system pits one spouse against another in a legal proceeding, by compelling one spouse's *involuntary* testimony against the other, such an act harms the marriage. Society has thus determined that strong marriages, in general, are preferable to the justice derived from isolated instances of coerced testimony.

Similarly, society believes the benefit of a person confiding in their attorney offers a stronger benefit to society, than would be achieved by forcing disclosure of the one person who has the obligation of protecting the legal rights of the accused. If attorneys were compelled to testify against their clients, the Constitutional protection against self-incrimination would be illusory.

Therefore, in recognizing the clergy-client privilege, society has essentially made a value judgement. It has determined that full and complete honesty between these two

parties serves the public good. Forcing disclosure, even occasionally, harms the public good more than the fruits of disclosure would offer. By this logic, if clergy were compelled to testify against their own parishioners, people would not confide in their clergy. If people did not confide in their clergy, they would forego the advice and counsel of those who could indeed help them the most. Through this loss, society would be harmed, because the people who need the most help would not receive it. Forcing disclosure at the peril of the client, even once, even when it would bring justice in a particular situation, would dissuade many more people from seeking the help they need. Thus, society is better served by a general expectation to privacy, hence, the privilege, than by selective, coerced, although occasional and rare, disclosure.

Thus, each privilege identified above, exists and is recognized under law, because the privilege protects the sanctity of the relationship. The protection of the relationship serves society. Society would function poorly when there was mistrust in any of these relationships. In this regard, John Wigmore, in Evidence, offers the common legally operative definition of any type of privileged communication, known as the “Wigmore Formulations:”

1. The communication must originate in the confidence that it will not be divulged.
2. The element of confidentiality must be essential to the full and satisfactory maintenance of the relationship.
3. The relationship is one, which in the opinion of the community must be sedulously guarded.
4. The injury of disclosure would be greater than the benefit of correct litigation.<sup>64</sup>

Implicit in these formulations are two important factors. The “owner” of the privilege is the person making the declaration. Normally, only the “owner” can permit disclosure.

The person hearing the communication has a fiduciary obligation to maintain secrecy. While the client is the owner of the privilege, the professional may, in absence of specific direction, claim the privilege on behalf of the client. The professional, however, cannot waive the privilege without the express permission of the client. Yet by this principle of ownership, the professional must realize that he or she has direct responsibility to the client, and functions only with the permission of the client. In this sense, the person uttering the communication is the owner of the information, and thus, is the only one who determines when and under what circumstances it will be disclosed.

Also, consider the purpose of the communication. Item 2 of Wigmore's formulations is illustrative. Without the expectation of such privacy, the goals of the relationship are impossible to achieve. The person offering the communication has a purpose in mind – ostensibly in the clergy-client conversation, to obtain spiritual guidance or forgiveness. In such a communication, privacy is crucial, because without privacy, the goal or purpose of the communication would be frustrated.

In summary, this discussion of societal good is not without its limitations, for what society values changes over time. Consequently, the privilege changes according to how such values change. In a concrete example, most states has modified all four privileges I previously introduced in the area of child and/or elder abuse. These changes are not uniform, and vary between jurisdictions. The point here is that society is now determining that the hideous nature of child abuse (or elder abuse) truncates the

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<sup>64</sup> Wigmore, John Henry. Evidence. Boston: Little, Brown and Company, 1940. Volume 8, page 581.

expectation of the privilege. Society is better served by preventing child abuse than by maintaining the privilege.<sup>65</sup>

### **The Specific Context of the Privilege**

Bush and Tiemann note that all fifty states have incorporated the clergy-client privilege in statute.<sup>66</sup> While a statutory privilege does not exist in Federal law, per se, the Supreme Court recognizes the privilege through Rule 506 of the Federal Rules of Evidence.<sup>67</sup> Congress, however, has not enacted legislation formally implementing this rule. Further, as I will demonstrate later, the military services have incorporated the privilege in their rules of evidence.

The difficulty, though, is that while there is an almost universal recognition of the clergy-client privilege, there is little consistency in how the privilege is construed or applied. For example, some states restrict the exercise of the privilege to those clergy whose specific church discipline requires the sanctity of the confession. Other states, however, are more liberal. Some states require that such confessions must be specifically penitential, while others offer greater latitude in subject matter covered by the privilege. Moreover, most statutes deny the privilege when a statement is made in the presence of a third party (marriage counseling, for example), while some specifically provide protection for this type of counseling. I have included all statutes in Appendix 1. Here, then, I will not take a state by state poll of all the relevant statutes – the reader may, and

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<sup>65</sup> See Appendix 2 for child abuse exceptions and Appendix 3 for elderly abuse exceptions. Note however, the lack of consensus – especially in terms of when the privilege is maintained and when it is abrogated.

<sup>66</sup> Bush and Tiemann, page 121.

<sup>67</sup> Larkin, Murl A. Federal Testimonial Privileges. Eagan, MN: West Group, 2000, page 10-31.

should, consult the statute appropriate to his or her jurisdiction. Here, though, I will discuss several common problems and conflicts between state statutes.

### **The Definitions of “Clergy” and “Church”**

The entire discussion of the issue of privileged communications hinges on the definition of *who* is a *clergyperson* and *what* is a *church*. This is a particularly hard undertaking in that statutes and courts are reluctant to define such terms, because making a determination could place them in jeopardy of violating the Establishment Clause of the United States Constitution.

As it pertains to the definition of clergy, the overwhelming majority of states use a general definition of “minister, priest, rabbi ...” or words to that effect, to define members of the profession. Some states, notably Alabama, provide the condition that the minister or priest be duly ordained and be engaged in the practice of ministry as a primary vocation. Other states, however, (Oklahoma, Nebraska, Wisconsin, and North Dakota, etc.) broaden the privilege to include confessions made to persons whom the confessor “reasonably believes to be” a minister at the time the declaration is made.<sup>68</sup> Furthermore, Mississippi allows the privilege to be extended to clerks and stenographers who assist the minister.<sup>69</sup> Pennsylvania omits “self-ordained” ministers.<sup>70</sup> States routinely deny the privilege to elders of the Presbyterian Church and Christian Church (Disciples of Christ), as well as the general membership of the Jehovah’s Witnesses.<sup>71</sup> The general rule seems to be that states are rather broad in who they grant the privilege

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<sup>68</sup> Bush and Tiemann, page 107.

<sup>69</sup> Ibid.

<sup>70</sup> Ibid, page 108.

<sup>71</sup> Ibid.

to, but favor those clergy persons who are duly ordained by, and regularly function in established church bodies.

Courts and states have also been reluctant to offer a coherent or uniform definition of what constitutes “church.” Tiemann suggests that Congress had the opportunity, but has refused, to provide such a definition.<sup>72</sup> In fact, the most coherent definition of “church” or religious organization has been provided by the Internal Revenue Service, in terms of what classes of organizations are entitled to receive deductible charitable contributions. In this regard, Tiemann informs us that the United States Tax Court, in 1987, established a fourteen criteria test to determine whether an organization was a church.<sup>73</sup> Among these fourteen criteria include a creed and form of worship, a code of doctrine and discipline, a place or worship and regularly scheduled worship, actual congregations, and a list of members who maintain membership in that organization exclusively. While these rules only legally apply to tax considerations, it does, however, offer a guideline as to what constitutes a church or religious organization.

### **Church Discipline and the Privilege**

The above discussion of how churches and clergy are defined is particularly germane to the issue. State statutes and relevant case law have made distinctions in applying the privilege based on two criteria. First, whether or not the clergy bases his or her action on the established discipline and teachings of the Church; and second, according to the teachings of the Church, whether or not the confession was “penitential” in nature. In this section, I will review these limitations and issues.

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<sup>72</sup> Ibid, page 105.

<sup>73</sup> Ibid, page 106.



Tiemann suggests that state statutes relative to privileged communications are strictly construed, and that states generally favor the privilege when church doctrine, discipline, or polity requires privacy, but question the privilege when the church does not teach or practice it.<sup>74</sup> For example, the Montana statute limits the privilege by “[the clergy’s] professional character in the course of discipline enjoined by the church to which he belongs.”<sup>75</sup> Similarly, an Indiana court, in *Dehler v. State* (1899), ruled that a confession made to a Roman Catholic priest was privileged. Moreover, the Minnesota Supreme Court reached the same finding concerning a confession made to a Lutheran pastor, in the case *In re Swenson*.<sup>76</sup> In both cases, the courts found that the act of confession was an established discipline and practice of those churches. When faced with cases involving ministers from churches with no formal act of confession, courts were reluctant to uphold the privilege. A noted case in this regard is *Johnson v. Commonwealth* (1949, Kentucky), where confessions made to a Methodist minister were ruled admissible, because the Methodist Church had no discipline of confession.<sup>77</sup> In Illinois, the court made a similar finding in *People v. Diercks* (1980), where the Baptist pastor’s testimony was admissible because the Baptist Church had no discipline regarding confession as a sacrament.<sup>78</sup>

Another criterion states and courts often apply pertains to the nature and substance of the confession: whether or not the confession is “penitential” in nature. Courts tend to favor the privilege when the communication is clearly penitential, but

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<sup>74</sup> Ibid, page 121.

<sup>75</sup> Montana Code Annotated, Section 26-1-804.

<sup>76</sup> Bush and Tiemann, page 122.

<sup>77</sup> Ibid, page 124.

<sup>78</sup> Ibid.

negate the privilege when the communication is of a more general type.<sup>79</sup> The California statute seems to be the strictest. In California, such communications must be in total confidence, and in accordance with the tenets of the religious body, and where the tenets of the religious body require secrecy.<sup>80</sup> Kentucky, similarly, once considered only religiously penitential confessions as private. *Johnson v. Commonwealth*, previously cited, set precedent. The minister's visit to the jailed inmate, Johnson, was unsolicited. During the visit, the suspect, Johnson, bragged to the minister about the murder he committed. The minister was compelled to testify concerning this conversation. The court ruled that the statement was not penitential, and that the defendant did not speak with the minister in his capacity as a "spiritual advisor."<sup>81</sup>

One final note concerning some limitations concerning confessions: such confessions must be of prior acts. One cannot confess, and therefore expect confidentiality of future acts. Hence, if one declares to a clergyperson that he or she intends to do a certain behavior, that conversation is not privileged. Furthermore, considering the nature of the proposed act, such a confession might indeed involve a "duty to warn," addressed below.

### **Third Party Communications**

Both courts and statutes generally deny the existence of privileged communications when third parties are involved. As the privilege arose in the context of the confessional, this context assumes that the only people present are the clergy and client. Hence, such communications lose their confessional nature when third parties,

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<sup>79</sup> Ibid, page 135.

<sup>80</sup> California Evidence Code, Section 1032.

either directly or indirectly, are involved in the communication. In this regard, third parties may be involved in two ways: either present at the time of the communication, or (at some time later) as a recipient of the substance of the communication.

In terms of the first type of third party presence, courts are fairly unanimous that there is no privilege if a confidence is revealed in the presence of a third party. Though some states extend the privilege to ministerial assistants, the general rule is that the presence of third parties compromises the privilege. For example, Tiemann describes a case in South Carolina where a minister visited a jailed parishioner with his spouse. The court compelled the minister to testify, because the presence of the minister's spouse compromised the privilege.<sup>82</sup> [This case presents an interesting dilemma. In our day of paranoia concerning accusations of sexual impropriety, some clergy, when counseling members of the opposite sex, insist on having a third person present. How does this potential loss of privilege impact on one's style of ministry?]

The more common third party complication occurs in the context of marriage counseling. Courts in California have denied the privilege, because the presence of the spouse, along with the person making the confession, compromises the privilege.<sup>83</sup> Yet, one court in North Carolina has held that because honesty and reconciliation are at the heart of marriage counseling, the privilege should apply.<sup>84</sup> [In this situation, the husband admitted to an extramarital affair in the course of joint marriage counseling. The wife used this disclosure (gained only as a result of the counseling session) as a ground for divorce. The court held that since this disclosure occurred in the context of counseling

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<sup>81</sup> Bush and Tiemann, page 125.

<sup>82</sup> Ibid, page 139.

<sup>83</sup> Ibid, page 138.

<sup>84</sup> Ibid, page 140.

the judge erroneously allowed it to be admitted as evidence in the divorce proceeding.]<sup>85</sup> Marriage counseling points to an interesting problem that I have not found sufficiently addressed by the courts. This type of counseling pits two competing privileges against each other: the clergy-client privilege and the husband-wife privilege. It could be argued that by virtue of these two co-existent privileges, all in the relationship are bound: either by one privilege or the other.

On some occasions, a penitent asks the clergy to disclose the communication to a third party. For example, the penitent confides to the clergy about committing a crime. He or she then directs the clergy to contact the police. This was precisely the case in a Kentucky court.<sup>86</sup> In such situations, courts have ruled that no privilege exists. Similarly, one can only expect the privilege when one confesses his or her crimes, and voids the privilege when confessing of the crimes of another. If, in a crime, A, the accused, denies the crime but implicates B to the priest, the priest may testify concerning the implication of B. The third party, B, cannot claim the privilege to disallow A's testimony, because B was not a party to the conversation. An individual can only confess one's own sins, and not the sins of another, and still expect privacy.

Yet sometimes a third party becomes involved by way of referral. If I, as a clergyperson, refer a client to a psychiatrist, courts have usually ruled that the privilege stands, because the referral serves the purpose of the client in making the disclosure. This rationale is particularly strong when the relationship to which the person is referred is also a privileged relationship.

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<sup>85</sup> Ibid.

<sup>86</sup> Ibid, page 139.

There is a special category of third party communications that warrants attention: that of compelled disclosure. Within this category, there are two types: legally compelled disclosure and duty to warn.

As I alluded to earlier, although society has placed a high value on the clergy-client relationship, society constantly reevaluates that value. Society is now reaching a consensus that certain behaviors are so heinous that preventing them outweighs the expectation of privacy. Most states now provide for the mandatory disclosure of a clergyperson's knowledge of child, spousal or elderly abuse. As can be seen in Appendix 2, states differ as to which privileges are *abrogated* (mandatory disclosure), and who can maintain the privilege. In only six states, are clergy immune from mandatory disclosure of child abuse (Florida, Kentucky, Minnesota, Oregon, South Carolina, and Wyoming). Several of these states modify this exception by limiting privacy only when confession is a documented practice of "church discipline." Thus, among these six states, not all clergy keep the privilege in this specific arena: only clergy whose church discipline provides for a private confessional. The wise clergyperson will become aquatinted with this important issue. Given the overwhelming public support of preventing abuse, clergy who choose to maintain the privilege face a difficult choice.<sup>87</sup>

Sometimes, however, the clergy face a dilemma: what about the situation of imminent harm, where the client is at risk for harming either self or others? Is there a "duty to warn?" Courts have said, "Yes." In 1968, a certain man, Mr. Podder, became smitten with a Miss Tanya Tarasoff. Both were students at the University of California at

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<sup>87</sup> To illustrate this lack of consensus, David Fenton argues in the Baylor Law Review (Fenton, David. *Texas' Clergyman-Penitent Privilege and the Duty to Report Suspected Child Abuse*. Baylor Law Review, Volume 38, No. 1) that the only precedent requiring a clergyman to report suspected child abuse was the State Attorney General's opinion.

Berkeley. Upset by her rejection, he became extremely depressed. He sought counseling and confided to the University psychiatrist that he intended to kill her. The psychiatrist took no action. Soon afterward, he indeed killed Miss Tarasoff. Her parents sued the University. The resulting opinion, *Tarasoff v. Regents*, established a “duty to warn.”<sup>88</sup> A duty to warn is simply that – if the professional (a psychiatrist in this case) comes to know of a situation that places either the client or the public in a potentially dangerous situation, he or she may be legally obliged to breach privacy, to prevent the harm. Here, again, the clergy must consider the problem of causing harm, versus remaining silent. The clergy may face a liability issue in how this question is answered.

### **Privileged Communication in the Military**

Up until now, I have discussed the legal aspects of privileged communications in terms of how states interpret the privilege. As I noted above, there is no corresponding privilege in Federal jurisdictions, except that the Supreme Court generally abides by Rule 506 of the Federal Rules of Evidence. The United States military is the one Federal exception. Under military justice, the privilege is strong. Criminal proceedings brought under the Uniform Code of Military Justice are governed through the Military Rules of Evidence (MRE). These rules of evidence govern the types of information that is considered admissible or inadmissible. Patterned after the Federal Rule 506 is the Military Rule of Evidence 503, which states:

#### **Rule 503. Communications to Clergy**

- a) **General rule of privilege.** A person has a privilege to refuse to disclose and to prevent another from disclosing a confidential communication by the person to a clergyman’s assistant, if such

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<sup>88</sup> Bush and Tiemann, page 172.

communication is made either as a formal act of religion or as a matter of conscience.

- b) **Definitions.** As used in this rule:
  - 1) A “clergyman” is a minister, priest, rabbi, chaplain, or other similar functionary of a religious organization, or an individual reasonably believed to be so by the person consulting the clergyman.
  - 2) A communication is “confidential” if made to a clergyman in the clergyman’s capacity as a spiritual advisor ... and is not intended to be disclosed to third persons other than to whom disclosure is in furtherance of the purpose of the communication.
- c) **Who may claim the privilege.** The person may claim the privilege. The clergyman ... may claim the privilege on behalf of the person.<sup>89</sup>

This rule has two definite strengths over its civilian counterparts. First, it strengthens the right of privacy in dealing with third party disclosures. The caveat, “disclosure is in furtherance of the purpose of the communication,” anticipates that the clergy or chaplain may indeed be required to involve others in the substance of the communication to achieve the purpose of the communication. For example, the chaplain may have to refer the client for alcohol-related treatment, or in the case of spousal abuse, to anger-management classes. Although by the “third-party exception” in some state statutes, such a referral would prevent the client from exercising the privilege in the civilian community, this rule clarifies this weakness. Further, the rule (in the Definitions section) anticipates that other people function as clergy, while not necessarily occupying the office. As we shall see soon, the Army Regulation implementing this rule includes Chaplain Assistants in the privilege.

MRE 503, however, is specific in what types of communication are subject to the privilege. It includes only communications made as a formal act of religion or as a matter of conscience. Furthermore, it only includes conversations made to the chaplain

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<sup>89</sup> Military Rules of Evidence. Page 649.

or clergy “in [their] capacity as spiritual advisor.”<sup>90</sup> Thus, not every conversation made to a chaplain or clergyperson is privileged. Such conversations must have a spiritual, religious, or conscience-driven component, offered to the chaplain *precisely* because the chaplain is a spiritual advisor. As a concrete example, a conversation to a chaplain offering contrition and asking for forgiveness for committing a crime or a sin is privileged. A new private, asking the chaplain for advice on a “way out of the Army” is not necessarily privileged, though, for professional reasons (Chapter 3), it might be nonetheless private.

The seminal court case where MRE 503 was tested and affirmed was in the Marine Corps case of *United States v. Isham*. Lance Corporal Michael Isham, a young Marine, set up an appointment with his chaplain. In this meeting, he described his anger and depression, and confided to the chaplain that he planned to shoot others and then kill himself while on the rifle range, where his unit was scheduled to participate. At the point of making this disclosure, the Chaplain immediately suspended the interview, notifying Isham that it was his (the chaplain’s) responsibility to disclose the threat (recalling his “duty to warn”) and seek more professional help from more qualified persons. In the course of seeking this help, the chaplain made the command aware of this portion of the conversation. The command then preferred charges against Isham for “Communicating a Threat,” a violation of Article 134 of the UCMJ. At the appellate level, all charges and specifications were dismissed. The court held that the trial judge erroneously admitted the chaplain’s testimony of his conversation with Isham. The court identified three essential prongs of the privilege in MRE 503. First, the communication must be made as

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<sup>90</sup> Ibid.



a formal act of religion or a matter of conscience. Second, the communication must be made to a chaplain or clergyman in his role as spiritual advisor. Third, the communication was intended to be confidential. The Court found that Isham's communication to his chaplain met all three prongs.<sup>91</sup>

The court found that the chaplain's disclosure of Isham's conversation to the command was "is in furtherance of the purpose of the communication," in accordance with MRE 503. The chaplain made the disclosure to obtain help for the soldier. The command, however, misused that information by preferring charges. Furthermore, this case offered the court to offer its guidance and insight on the role and relationship of the chaplain. Writing for the court, the judge said:

The penitent who comes to the chaplain for counseling does not normally desire to carry out the threat of harming anyone. Rather, he or she wants to resolve the anguish by getting help, first, from the chaplain for their spiritual and moral anguish, and then from others as appropriate. After ministering to the penitent's spiritual and emotional needs, in most cases the chaplain will be able to convince the penitent to voluntarily cooperate with other caregivers and those in the chain of command. In cases where the servicemember appears intent upon carrying out a destructive act upon leaving the office, the chaplain must take more direct measures, other than violating the confidence, to prevent harm. In extreme cases, this may entail personally accompanying the penitent until the chaplain can guarantee that not harm will result.<sup>92</sup>

By setting aside the finding of guilt for Isham, the court affirmed the privilege. The court implied, however, that the chaplain made a poor decision to inform command, because the command may indeed have a different agenda in the situation. The court resolved this difficulty by stressing the need for creativity among chaplains, even if it means a

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<sup>91</sup> Military Justice Reporter, Volume 48. Eagan, Minnesota: West Group, 1999, page 607.

<sup>92</sup> Ibid.

great inconvenience. The chaplain thus has a duty to the client and duty to the organization (or society) in general to maintain privacy while preventing harm.

### **The Army Privilege**

The Army, and Army chaplains function under the provisions of the UCMJ. Therefore, in terms of the issue of privileged communications, confidentiality of Army chaplains is covered under the above-cited Rules of Military Evidence. The Army, like the other military services, has incorporated the substance of MRE 503 into its regulations. Army chaplains are governed under AR 165-1, Chaplain Activities in the United States Army:

#### **Army Regulation (AR) 165-1 (Paragraph 4m.)**

- (1) A privileged communication is defined as any communication to a chaplain or chaplain assistant given as a formal act of religion or as a matter of conscience. It is communication that is made in confidence to a chaplain acting as a spiritual advisor or to a chaplain assistant aiding a spiritual advisor. Also, it is not intended to be disclosed to third persons other than to whom the disclosure furthers the purpose of the communication, or to those reasonably necessary for the transmission of the communication.
- (2) The privilege against disclosure belongs to the declarant ... the privilege may also be claimed on behalf of the person by the chaplain or the chaplain assistant who received the communication.<sup>93</sup>

Since this regulation represents the Army's implementation of MRE 503, the wording and language are similar. The only difference of note is that AR 165-1 specifies chaplain assistants (enlisted Army soldiers of Military Occupational Specialty 71M, whose primary duty is to provide logistical and administrative assistance to chaplains) are

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<sup>93</sup> AR 165-1. Paragraph 4m (1) and (2).

included in the privilege. The Army understands that the chaplain cannot adequately function without administrative assistance. Yet in the course of providing such assistance, the chaplain assistant will inevitably have access to records of counseling containing privileged communications. Also, especially in the absence of a chaplain, soldiers occasionally confide in chaplain assistants. Therefore, the Army deemed it necessary to include these vital assistants into the privilege.

Thus, within the particular military context of ministry, privileged communications are those disclosures that are made to the chaplain or chaplain assistant, in their role as spiritual advisors, and made as an act of religion or as a matter of conscience, with the expectation of privacy. The permission of disclosure belongs to the person making the declaration. The chaplain may, however, disclose the information made under these conditions to those persons who are essential in furthering the purpose of the communication.

Within the Army chaplaincy, a strong principle exists which asserts that chaplains must not be compelled to violate their ordination vows or tenets of their particular faith.<sup>94</sup> Yet the Army chaplaincy, as I previously demonstrated, is theologically quite diverse. Thus, chaplains whose denominational backgrounds, endorsing agencies, or doctrinal faith have strong positions regarding the sanctity of the confessional, when confronted with a confidentiality issue, should seek initial guidance from their respective faith groups. Beyond the legal considerations, a chaplain who violates a tenet of faith in this regard could lose ecclesiastical endorsement, and therefore be removed from the Army.

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<sup>94</sup> Ibid, paragraph 4-4 e&h.

For those chaplains whose faith group is silent or ambiguous on the subject, he or she should seek counsel from his or her supervisory chaplain.

A note, however, needs to be made about *jurisdiction*. Jurisdiction refers to the venue in which legal proceedings are brought. State, Federal, and Military courts represent separate and distinct jurisdictions. Although there are some Federal exceptions, each court exercises authority, or jurisdiction, only over its particular realm. Yet the concerns and actions of people rarely correspond to these discreet boundaries. Thus, when a chaplain counsels a soldier, he or she must be sensitive to the information being provided and who has interest in the soldier's actions. Sometimes, the soldier may confess to committing a crime which is only a crime under the UCMJ. In such a case, MRE 503 applies. Or, a soldier could confide in an action that could be prosecuted under a civilian court. In such a case, the civilian privilege applies. Accordingly, a soldier may come to the attention of both jurisdictions. Two different provisions adjudge the chaplain's potential testimony. Or, the chaplain may counsel a civilian (a soldier's spouse, for example), who is not subject to the UCMJ. [There are cases, however, where a civilian makes a disclosure to a chaplain that involves a soldier being prosecuted under the UCMJ. In such a case, MRE 503 may or may not apply.] Chaplains (and all clergy) need to know and be conversant with the privilege as it may exist in all the jurisdictions they are potentially subject to. The military provision (MRE 503) does not apply in civilian courts. Civilian provisions do not apply in military courts-martial.

I raise this issue of jurisdiction to underscore the complexity of the entire issue of privileged communications. Army Regulation 608-18, The Army Family Advocacy Program, informs us that while generally, federal jurisdiction is exclusive, the issue

becomes complicated when dealing with issues such as child abuse. State laws can be enforced on military reservations under the provisions of the Assimilative Crimes Act (18 U.S.C. Section 13). Under this act, violations of state law are “federalized” for prosecution. Enforcement of state civil laws by state authorities occur by the invitation of the installation commander.<sup>95</sup> Also, while most states abrogate or modify the testimonial privilege concerning the issue of child abuse, the military privilege remains intact: “A uniformed or civilian member of the clergy has no obligation to make a report of child or spouse abuse that comes to his attention as a result of privileged communication.”<sup>96</sup> The wise chaplain or clergyperson must therefore understand and discern the contexts in which they practice ministry.

Furthermore, for chaplains in particular, the roles of supervisor and confessor are mutually exclusive. To free the supervisory chaplain to do his or her job, though this person is a clergyperson, he or she *must not* hear the confessions of a subordinate for which he or she has supervisory responsibility. As a supervisor, this chaplain must arrange for another chaplain, outside the technical chain, to provide such spiritual guidance to his or her subordinates. To be a confidant in this situation creates a great conflict of interest for the supervisor.

### **Analysis and Principle**

Throughout this section, I have attempted to provide a cogent discussion of the legal issues involved in privileged communications. Since even the term itself arises in the legal profession, clergy need to understand that as they consider this issue, they are

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<sup>95</sup> AR 608-18. The Army Family Advocacy Program. Section D-1.

<sup>96</sup> Ibid, section E-4.

operating outside their milieu. By offering this discussion, my goal is that a member of the clergy will gain enough of a legal knowledge of the issue, such that he or she can recognize counseling situations where the issue of privileged communications may be operative. Since privileged communication involves what may be offered as testimony in a legal proceeding, it presumably only arises when the client is in some legal peril. Therefore, if a clergyperson encounters a situation where client faces a legal proceeding on which the clergyperson has provided counseling, the clergyperson should seek legal advice. After having said this, however, I believe some summary of this legal discussion is appropriate.

Fundamental to the entire legal issue is the fact that the clergy-client relationship has an inherent value to society. Society, then, is one party to the discussion. In fact, I can (and will) argue that under this legal understanding, the real “client” is not only the person seeking the counseling. Another real client is society. This confidentiality serves society. Social good also determines when such confidentiality is not good, or in its best interest. In making this argument, I do not trivialize the role and needs of the person seeking counseling. Privileged communication indeed serves his or her good by preventing disclosure of certain sensitive information. Yet all potential clients are served by the general expectation to the privilege. The general society is best served through the creation and strengthening of relationship where people can receive appropriate advice and assistance. Any denial or relaxation of the privilege may harm the client, but it harms many others, who would have relied on the privilege, except that it is now being denied. Thus, society’s needs are being served through the privilege, and a major client is the society as a whole.

Yet there is an additional issue to consider: while court rulings seem confused and contradictory in their various interpretations of the privilege, there seems to be a consensus favoring privacy. In fact, the actual number of court cases where the privilege has been tested is sparse. This leads one to conclude that courts are reluctant to even consider requiring clergy testimony, because of a predisposal to grant the privilege.

While this is good news for the clergyperson, it does not mean that the clergy are immune from testimony. Particularly as I have noted, society's values are constantly in flux. As child and spousal abuse, particularly, have gained their appropriate societal attention, one can argue that the general "good" of preventing these evils is greater than the right to privacy. Thus, members of the clergy must be women and men of discernment. In absence of a church doctrine or ordination vow of the privacy of the confessional, the wise clergyperson must make the ethical decision on how best to achieve the good of society. Is, for example, the prevention of the sexual molestation of a child greater than the molester's expectation to privacy? Yet if one violates that privacy, is one creating a certain level of faithlessness in dealing with clients, that would prevent others from seeking help?

Thus, considering this problem, I am prepared to offer my second of three ethical principles:

**Society has placed value in the relationship between the clergy and the penitent. Those who occupy the office of clergy must exercise their office judiciously. Society has determined that private confession, in most circumstances, is preferable to disclosure, because such privacy serves the good of the entire society. This preference, however, is legally defined, and is not absolute. The clergy must discern the legal issues, while weighing by other values recognized by society. In this principle, the clergy seeks the good of society. However, the clergy must recognize and understand the constantly changing expectations and norms of the "society" in which he or she practices ministry.**

By offering this principle, I do not mean to suggest that either chaplain or clergy surrender leadership to society in making a decision that profoundly affects the client. I believe, instead, that any such decision involves a tenacious balance. In resolving this balance, the clergy must be able to understand and weigh these competing concerns. Yet a crucial ingredient in weighing these concerns, is that one must consider the current legal environment. In a great sense, as privileged communications is a legal (and not theological) doctrine, the clergy does not even establish the ground rules for the discussion. The clergy may have only the choice to disclose or not disclose. Refusal to disclose, when confronted with a court order, may place the clergy in legal jeopardy. Yet by placing this tension in the frame of reference of how the good of society and the client can be simultaneously maximized, the clergyperson can assist the client more effectively.

My opinion, then, is that the clergy should generally resist disclosure. Society values the good of the relationship, and courts seem to favor the privilege. Furthermore, the clergyperson possesses a theological foundation for the privilege. Moreover, as many statutes base the granting of the privilege on an “act of religion or as a matter of conscience” (or phrases of similar construction) the clergyperson is the *primary* determiner of what constitutes either.<sup>97</sup> Bush and Tiemann concur: “It is our contention *that religious communities and religious communities alone*, have the right and the responsibility for determining the answers to such questions.” (emphasis mine)<sup>98</sup> Thus, in applying this second ethical principle, the clergy plays a strong role: he or she, as representing a community of faith, is the *first* determiner of the nature of the communication.

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<sup>97</sup> AR 165-1. Paragraph 4m (1).



The application of this ethical principle occurs somewhat differently for the military chaplain. Indeed, the military is its own separate and distinct society. As I previously indicated, the military grants the privilege by applying three essential prongs or elements. The communication must be made as a formal act of religion or a matter of conscience; the communication must be made to a chaplain or clergyman in his role as spiritual advisor; and, the communication was intended to be confidential. I believe, particularly in the military setting, that a strict construction of the privilege, in accordance with MRE 503 and AR 165-1, is the right answer. The provisions created by these doctrines offer the chaplain sufficient latitude in determining what indeed involves a “matter of conscience.” The ruling in *Isham* affirms this.<sup>99</sup> Also, these doctrines provide for the maintenance of the privilege even when disclosure is made to third parties. The chaplain is more free than his or her civilian counterparts, by enlisting the aid of others in the helping profession to serve the client’s interests. This provision is usually unavailable for many civilian clergy.

In closing this section of legal discussion, I shall allow the United States Supreme Court to have the final word. In the only case, *Trammel V. United States* (1980), that reached this august court concerning the priest-penitent privilege, the court held the privilege was:

Rooted in the imperative need for confidence and trust, the priest-penitent privilege recognizes the human need to disclose to a spiritual counselor, in total and absolute confidence ... to receive priestly consolation and guidance.<sup>100</sup>

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<sup>98</sup> Bush and Tiemann, page 135.

<sup>99</sup> The court found that *Isham*’s “confession” of anger and hostility was indeed a “matter of conscience.” The court apparently equated a plea for help with an act of conscience.

<sup>100</sup> Bush and Tiemann, page 128.

## **Chapter 3**

### **The Professional Relationship – The Chaplain as Confidante**

Before turning to the role of the chaplain (or other clergy) as it pertains to fulfilling a professional role and responsibility, I would like to pause, briefly, to summarize the discussion up to this point. I must state, however, that none of the roles of the clergy I have introduced are discrete entities. The clergy or chaplain maintains some aspect of each of these roles simultaneously with any client. The clergy always meets the client, the other person, on multiple levels, with multiple goals and multiple expectations for privacy.

I opened the discussion of private communications by first introducing confession as sacrament. Originating from certain theological positions, this type of communication bases the relationship with the client as one who stands before God. The chaplain or clergy is a mediator between the person and God. In a very real sense, the clergy, in this venue, primarily serves God. As a representative of God, the clergy becomes the vehicle to offer the penitent forgiveness of sins. While I noted that this role of the clergy has evolved to a more pastoral counseling model, the basis of the relationship remains the same: the clergy has power because he or she represents God. Privacy in the relationship becomes essentially an extension of the client and his or her relationship with God. The person confesses sins. He or she discloses behaviors which he or she understands to violate God's laws, without respect to whether the conduct is illegal. Since the clergy pronounces God's forgiveness, the privacy the clergy maintains is God's. While the client has a definite and individual relationship with the clergy, the "client" most being served, is God.

I then considered the more modern, and more legal understanding of privacy between clergy and client. Called, properly, privileged communication, this is a more limited aspect of private communications in that it only concerns that which is admissible against the client in adverse legal proceedings. The basis of this privilege is societal. Society has determined that some relationships are inherently valuable, and as such, create a strong expectation to privacy. In this mode of communication, the client confesses his or her behavior to the clergy, usually those behaviors he or she reasonably believes to violate the law, without respect to whether such conduct is a sin. Indeed, crime and sin are occasionally mutually exclusive. Since, in this mode, the clergy is a participant (albeit unaware of it at the time) in the legal system, the privacy the clergy maintains belongs to the client, but appropriately belongs to society as a whole. Society benefits from the clergy's privacy, because such privacy builds the relationships that benefit all of society. While the client has a definite and individual relationship with the clergy, the client most being served, is society.

Now I shall turn to a third classification of private communication: sensitive or confidential information that arises from the professional character of the clergy. I shall seek to show, in this section, the special relationship between clergy and client. This relationship, however, has professionalism as its origin. The professional role, the professional training, and professional ethics the clergy represents, become the basis of the relationship. The client seeks out the clergy because of expert advice and exemplary behavior. In this mode, the client most being served *is the client*. The clergy, in this mode, sees his or her role as allying with and having a fiduciary responsibility for the person, to seek the person's good, notwithstanding legal or societal obligations. While in

the above modes the client was served as an adjunct to either God or society, in this mode, the client's well-being is the only consideration.

### **What Constitutes a Professional**

While this section (in my discussion of confidential communication) occurs last, it is not due to its lack of importance. Indeed, the concept of being a professional is central to the definition of being a member of the clergy. Furthermore, military chaplains especially, who consider themselves already professionals by virtue of their ministerial training and ordination possess an additional, and equal, claim to professional status by virtue of their commissioning as officers of the United States Army.<sup>101</sup> Combining these two distinct claims of professional status, the military chaplain maintains responsibility to his or her clients as well as obligations derived from serving as a government official. In this section, I shall define what it means to be a professional.

Perhaps the verb, "to be" is most appropriate. Karen Lebacqz, in opening her discussion of professionalism, quotes Nolan Harmon by affirming: "The Christian minister must 'be' something before he can 'do' anything ... his work depends on his personal character."<sup>102</sup> Furthermore, Dennis Campbell, former Dean of the Divinity School of Duke University, reminds us that the clergy was considered one of the three "learned professions" (law, theology, and medicine), and that the original use of the word

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<sup>101</sup> As a military officer, a chaplain is appointed to serve by the President, and this appointment must be affirmed by Senate confirmation. A military officer is a member of the Executive branch of the United States government. Dean Dennis Campbell, (page 21, Doctors, Lawyers, and Ministers) states that military officership arose as a profession during the Middle Ages, presumably because soldiers swore their allegiance to the Church.

<sup>102</sup> Lebacqz, Karen. Professional Ethics: Power and Paradox Nashville: Abingdon, 1985. Page 63.

“layman” was used to distinguish clergy from non-clergy.<sup>103</sup> Campbell also notes that the earliest use of the word “professional” was used to distinguish a member of a religious order.<sup>104</sup> He maintains that the “learned professions” arose in the university setting, where the focus was on a liberal education, as contrasted with the “guilds,” where technical skill or crafts were taught and refined.<sup>105</sup> Beyond these word definitions, Campbell offers a concise, but general definition of what constitutes a professional.

1. The professional is engaged in a social service that is essential and unique. The services a professional offers are easily identified and unique.
2. The professional has developed a high degree of knowledge. Professionals, themselves, are the teachers of professionals.
3. The professional has the ability to apply a special body of knowledge to unique situations. The “practice” of the profession is equally as crucial as theoretical knowledge.
4. The professional is part of a group that is autonomous and self-regulating. Professionals possess authority and power. Those engaged in a profession govern those who enter, and discipline current members. This is achieved in several ways: ordination, for clergy, and state licensure for physicians and attorneys.
5. The professional recognizes a code of ethics. Although some are more formal than others (American Bar Association Code of Professional Responsibility, for example), members of the profession are solely responsible for deciding appropriate behaviors.
6. The professional accepts personal responsibility for actions and decisions. The professional is accountable for both the procedures and results of his or her work.
7. The professional’s commitment is to the community. The professional understands, and considers, the social implications of his or her activity and dealings with clients.
8. The professional is more concerned with services rendered than financial rewards. The professional seeks to contribute to the profession and to society, apart from financial rewards.<sup>106</sup>

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<sup>103</sup> Campbell, Dennis M. Doctors, Lawyers, and Ministers: Christian Ethics in Professional Practice. Nashville: Abingdon, 1982. Page 20.

<sup>104</sup> Ibid, page 18.

<sup>105</sup> Ibid, pages 19-20.

<sup>106</sup> Ibid, pages 21ff.

Karen Lebacqz, more briefly, offers a consensus definition of professionalism, claiming that professionals share “(1) advanced training, including (2) both an intellectual component and (3) a specific body of skills to be applied (4) in the service of (5) some important societal function.”<sup>107</sup>

Furthermore, it might be beneficial to consider professionalism from another of the “learned” fields. Craig Lawson, Law Professor at the University of Nebraska, offers six general characteristics of a professional, though aimed toward the legal profession:

1. The professional requires a substantial period of formal education.
2. The professional requires the comprehension of a substantial amount of theoretical knowledge, which differentiates it from the skilled crafts.
3. The professions are both an economic monopoly and are largely self-regulating.
4. The professions possess the greatest social prestige.
5. The professions are almost always involved with the greatest personal concerns people have.
6. The professions are involved in significant interpersonal concerns with their clients.<sup>108</sup>

Most, if not all, of these qualities are readily apparent in the ordained ministry.

Therefore, I do not feel it necessary to prove that clergy are indeed professionals.

Similarly, neither Campbell nor Lebacqz consider it their purpose to create a new or unique definition of professionalism applying only to members of the clergy. Nor do they doubt that ministry is indeed appropriately defined as professional, although they both admittedly develop their definitions though definitions developed (or commonly used) by other professions. Both, however, note a unique component to the clergy. Both authors note the extent to which the clergy functions in the social milieu. (Note items 1,

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<sup>107</sup> Lebacqz, page 65.

5, 6, 7, and 8 of Campbell.) While other professions, particularly law and medicine, seem to be more concerned with technical skill and codes of ethics that pertain to professional relationships among professionals, the clergy is unique. Aside from the technical expertise of defining a professional, or formal educational requirements, or a code of ethics, the chief characteristic of being a professional clergy is how the clergy functions in society and among those who are *not* members of the profession (i.e., the laity). Lebacqz reiterates this point: “It is no wonder, then that some commentators take the view that the typical profession is characterized by a focus on knowledge, skill, organization, or other aspects of task and not by a concern for character *being*.”<sup>109</sup>

In considering these three definitions, I would like to draw several inferences. First, being a professional requires significant, specialized skill, but these skills are relational. These skills have more to do with the relationship the professional has with other people (to the client, to other professionals, or to society as a whole) rather than to a body of knowledge. The possession of a body of knowledge, alone, does not qualify a person as a professional. As Lawson reminds us, a professional is concerned with the “greatest concerns people have.”<sup>110</sup> Dean Campbell concurs. He accepts this relational definition of professionalism by characterizing it as “style:”

Style means the difference between work done as a professional and work done as a job. It emerges from practice in response to the necessary combination of intellectual skills and learning, and practical skills and application. Perhaps it is significant, too, that when non-professional people comment on professionals, it is often matters of style that receives attention.<sup>111</sup>

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<sup>108</sup> Lawson Craig M. and Purtillo, Ruth B. Professional Standards: Ethical and Legal Aspects of the Physician - Patient and Lawyer Client Relationships. Lincoln: University of Nebraska College of Law, 1986. Page 3f.

<sup>109</sup> Lebacqz, page 65.

Second, the skill the professional offers benefits society, but society has a stake in the standard of care. Whether in law, medicine, or theology, the professional serves the good of society. This serving of good seems to be premised on the assumption that the skills the professional offers are valuable and needed (people have generated a “market” for them). But not just anyone can offer those skills. The skills the professional offers are so great, and the malpractice of them so damaging, such that only those who have societal approval should be allowed to engage in them.<sup>112</sup> Society, (usually expressed through the professional groups themselves) limit access to the profession and regulate current members in order to maintain a suitable standard of care. (Others, however, will argue that professions limit membership to maintain an economic monopoly.)

Third, professionals are concerned with the needs of people. As Campbell reminded us earlier, the professions arose as a contrast to the guilds. Guilds were concerned with objects, while professions were concerned with people. Thus, one cannot claim that a mechanic, no matter how skilled, is a professional. A mechanic is concerned with tools and torques, and not with the deep concerns of people. Consequently, professionals are usually engaged by a person only at the point of crisis or great personal need. One usually does not seek the services of a professional unless there is some strong, acute reason that fits within the expertise of the professional. Professionals, (clergy excepted – see below) usually do not maintain a strong social relationship with the client, except as it pertains to the need that brought them together.

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<sup>110</sup> Lawson and Purtillo, page 3.

<sup>111</sup> Campbell, page 26.

<sup>112</sup> This societal approval is expressed through licensure, ordination, commissioning, or some other legal or social approval.



Indeed, the professions share some common attributes. Yet when one considers the profession of ministry, some differences begin to become apparent.

The authority and regulation of the ministry is a function of the Church or other religious body. Whereas other professionals are self-regulated by only the members of that profession, or by law, the practice of ministry is mutually supervised by both the professionals (other clergy) and, in certain cases, the clients themselves (laypeople). This supervision is a function of polity, which varies according to religious tradition. Thus, there is no clear regulation among the entire profession.

The admission to the profession, while usually requiring substantial formal educational requirements, only has validity in the specific church body or denomination in which the candidate is a member. "Ordination" is the theological term that refers to ministerial standing. Other professions are licensed either by legislation or membership in a professional organization. In the case of military chaplains, one must be admitted to the profession of ministry as a prerequisite to admission to military officership.

The clientele of the ministry is usually voluntary and has many expectations of the relationship. Thus, the minister functions in a wide range of human concerns rather than in one specific, defined need. The relationship to the client is long term. In terms of professional compensation, the minister is usually remunerated by the voluntary support of the entire clientele, rather than for services rendered. [Again the military or institutional chaplain, as well as the independent pastoral counselor are the exceptions.] The minister has a great deal of contact with the client, ranging from social to crisis situations, while other professionals generally limit their contact with the client to the specific need or situation.

The definition of the profession is sometimes problematic. It is easy to know what a physician is, and therefore make some assumptions about the skill and expertise he or she offers, and then further determine if a physician can treat the problem one faces. A person's only difficulty may be in deciding what type of specialist is needed. Similarly, one usually knows if they have a legal problem, and thus, can easily seek out a lawyer. The ministry is somewhat different. Don Browning reminds us of the increasing specialization of the ministry, particularly as it relates to ministers engaging in the practice of pastoral psychotherapy based in independent pastoral counseling centers. He further reminds us that these specialized ministries have often appropriated the methods and philosophies of mental health professionals.<sup>113</sup> Other, more general ministries include the helping tasks of spiritual counseling and crisis ministry. The issue for the client is in knowing what expertise the clergy possesses and whether the client's need matches the clergy's expertise. The client is often unaware of such nuances – he or she knows that the clergy offer some type of counseling skill, but may not know the differences of those skills.

As Campbell has identified, most professionals have a Code of Ethics. Such codes exist in the ministry, but they are usually limited to codes within a denomination or church body. There are no uniform, mutually accepted codes of ethics that guide the general practice of ministry. Professional pastoral counselors, however, have elaborate codes of professional ethics, in which violating client confidentiality is severely punished.

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<sup>113</sup> Browning, Don S. Christianity and the New Psychologies. The P.H. Welsheimer Alumni Lectures, Emanuel School of Religion, Johnson City, Tennessee, March 28-30, 1979. Page 11.

Thus, the member of the clergy considers himself or herself, a professional, with certain societal roles and expectations attached to that status. But how does the client see the relationship? Do the professional clergy and the client share the same role expectations?

### **The Role Expectations of the Professional**

As I previously stated, in the clergy's role as a professional, the clergy seeks the good of the client above all else. Notwithstanding legal issues or concerns about sin, the client perceives a need in his or her life, and perceives the clergy as a helping agent. Thus, the two enter a relationship. This relationship can be a one-time pastoral counseling session, or become an extensive therapeutic relationship. This relationship, regardless of its length or character, is a "fiduciary" relationship. As a fiduciary relationship, the good of the client is sought. While what the client perceives as "good" might differ from the clergy's professional judgement as to what is most healthy, the clergy and the client form an alliance to seek the client's restoration to health. This means that the clergy judiciously apply his or her expertise appropriately, but recognize the limits of his or her training. Further, the clergy has the responsibility to terminate the care if the client's needs cannot be met, or if he or she and the client cannot agree on therapeutic goals. In such cases, the clergy must not abandon the client, but make appropriate referrals.

The clergy also maintains relationships with other professionals. While the client seeks out the clergy and establishes a relationship because he or she perceives a need and recognizes the clergy as a skilled helper, the client may not understand the

clergy's limits and skills. The client may have greater or different needs that the clergy possesses. Some of the client's problems may be within the clergy's expertise, but there may also be convoluting problems, which overlap into other areas. Therefore, the clergy must be able to establish limits with the client and maintain an ability to engage other professionals to assist the client.

From the perspective of the client, the client perceives a need in his or her life or functioning. The client perceives the clergy as one who has the skill to meet his or her needs, and thus, establishes a relationship. Yet how this relationship differs from the roles of sacramental confessor (Chapter 1) or legal counselor (Chapter 2), is in the type and substance of information shared. Here, the goal of the client is not to achieve the forgiveness of sins, nor to prevent legal disclosure of crimes, nor to unburden his or her conscience. The goal, instead, is to find healing, strength, advice, counsel, or guidance about whatever problem he or she faces. Furthermore, the information the client shares is typically not about sin, or crimes, or specific behaviors, but about thoughts, relationships, opinions, and feelings – the entire range of human emotion. The client discloses his or her innermost self with the clergy and specific behaviors only as they relate to, or shed light on those feelings. This is a substantial difference from the above discussions. Because the client perceives that his or her overall life-functioning is not working, or is problematic in some way, the issues he or she discusses will be more general. For example, the client seeks out the clergy because of a marriage issue. The client discusses his or her feelings about the partner, about the level of commitment to the relationship, about how he or she perceives the future of the marriage. The client may also discuss adultery or abuse (sins and crimes), but only *as they relate* or provide insight into the

overall character of the relationship. Forgiveness or legal protection is incidental for the client. The client wants assistance in some aspect of the marriage relationship, and comes to the clergy because the clergy has the skill to meet that need.

Or, the person may seek out the chaplain because of feelings of depression or some type of mental-health issue. While the clergy may not be able to fully heal the client, the clergy now possesses a significant amount of information about the client. The damage inflicted by disclosure, for many, may be greater than any particular behavior he or she has done.

### **The Expectation of Confidentiality**

Certainly, the context of the counseling situation affects its nature and the expectation for privacy. Richard Gula reminds us of this point: "The more formal the process and private the context in which information is exchanged, the greater weight given to it as confidential information."<sup>114</sup> Since the clergy, unlike most other professionals, often maintains social relationships with many clients while also maintaining counseling relationships with some, the clergy must first clarify what the nature of any particular relationship is. I argue here, that due to this diverse nature of the profession, once a conversation moves into the areas feelings, emotions, or life situations (even if it is on the golf course or in a restaurant), a confidential relationship is probably being established, with a consequent expectation to privacy.

As to the nature of the type of information the client discloses, the client understandably places a high value on the clergy keeping the confidence. Indeed, while

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<sup>114</sup> Gula, Richard M. Ethics in Pastoral Ministry. New York: Paulist, 1996. Page 120.

the above discussions (sacramental and legal) may only involve a specific isolated behavior, here, the client spills his or her entire self to the clergy. The clergy may know more about the person than anyone else. Thus, from the client's perspective, he or she places complete and utter trust in the clergy. The client does not want his or her entire self (feelings, perceptions, opinions, and relationships) up for public comment and scrutiny. Furthermore, there may be some facts or aspects of the client's life that should not be commonly known: whether or not he or she is contemplating a divorce, or if he or she has a mental health diagnosis. Probably, though there are no studies or statistics to validate it, I am convinced this is the area where the *client* maintains or expects the highest level of confidence. Disclosure of information in this relationship brings embarrassment and loss of dignity.

Most unfortunate, however, is that while the client may have the *highest* expectation to confidentiality here, this area represents the *lowest* legal protection for confidentiality. This lack of legal protection is mitigated by the strong underpinning of professionalism characterized by the clergy. Certainly, there are no laws stating that the clergy *must* keep all his or her clients' confidences in this arena. The law only permits the client to prevent the clergy from disclosing confidences in legal proceedings. Yet it is the *professional character and obligations* of the clergy that become the normative for maintaining confidences, coupled with the clergy's concern for the well-being of the client. Moreover, in some faiths, the clergy face excommunication or other discipline for violating people's confidences. This potential loss of professional status is another strong incentive. Furthermore, many clergy subscribe to codes of ethics. Professional pastoral counselors, particularly, face revocation of their credentials for unauthorized disclosure.

Thus, while the client has little *legal* protection for confidentiality (in revealing life's most intimate details), it is the character of the relationship that creates a strong protection. Yet this protection is not absolute. Richard Gula writes:

While some people may think that everything they say to a priest is either “under the seal” or is “privileged communication,” that is simply not true. Not all pastoral communication is confidential. Apart from the absolute prohibition of disclosing any communication in the sacrament of reconciliation [confession], confession is, as moralists like to say, a “general rule that applies generally.” That means that, as a principle, it cannot articulate every morally relevant difference among cases, and so must admit to exceptions. For the most part, pastoral ministers will want to keep confidential what they learn in the exercising of their ministry. However, there are a few instances, few though they may be, in which the duty to disclose may, and sometimes must, override the duty to confidentiality.<sup>115</sup>

What are the exceptions to this “general rule?” As we have seen earlier, some breaches of confidentiality may arise from a “duty to warn.” The clergy perceives that the current situation of the client offers the real possibility of harm, either to the client or a third person. Probably the most frequent example of this is a suicidal client. The client states to the clergy that he or she has been preoccupied with thoughts of suicide. The clergy, untrained in making a medical or psychiatric diagnosis, immediately refers (and should accompany) the client to another professional. If, however, in the exceptional case where a more appropriate professional is not immediately available, the clergy may be compelled to consider informing another family member or close friend, for the purpose of keeping the person safe until help is available.

More often, however, the professional clergy elects to break the confidence to further the goals and needs of the client. I've raised this earlier: the professional clergy is a member of the clergy and not usually a mental-health professional, psychologist, drug

and alcohol counselor, or marriage and family therapist. The clergy may, and should have a general knowledge in each of these areas, but is probably not a professional in these areas. The client, however, often sees the clergy as a multi-talented person, and seeks him or her out for these problems and more. Soon, however, the clergy realizes the client's problems extend beyond his or her expertise, and must refer the client to another professional. In such a case, the clergy may feel the need to judiciously discuss the client's situation with another person. Or, the clergy may continue assisting the client, but requires professional advice or supervision. Again, that which the client has revealed might be divulged. Obviously, the clergy should obtain the client's *prior* consent, and share information only to other professionals who subscribe to an ethic of confidentiality. Furthermore, the clergy should avoid sharing the client's name if at all possible, and otherwise share as little information as necessary to obtain the appropriate help.

While Gula anticipates the existence of possible exceptions to clergy confidentiality, Karen Lebacqz provides three strong arguments to maintain confidentiality. While her reasons have definite similarities to the common legal and theological bases of privacy of communications, her strength is that she roots her arguments in the unique character of trust of the professional relationship.

First, according to Lebacqz, the promise of confidentiality offers the client (or penitent) the encouragement to seek advice. While there are, as we have seen, definite legal issues involved in maintaining confidences, the keeping of confidences serves an additional purpose. It serves society by offering the penitent an avenue for forgiveness, but it also serves to maintain the ministry of the Church. Lebacqz writes:

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<sup>115</sup> Ibid, pages 129-130.



The rule that binds ministers to confidentiality ensures that the reputation of ministry in general, and of [her] own ministry in particular, is maintained so that others who are troubled or anxious will be encouraged to seek solace or professional counsel.<sup>116</sup>

The rule of confidentiality serves to maintain strong relationships. Distrusting the professional clergy's ability or desire to keep confidences harms the reputation of that particular clergyperson, but it dissuades others from confiding in clergy in general. Keeping confidences, though, enhances the ministry of clergy as well as the Church.

Second, clergy keep confidences to avoid harming the client. Lebacqz argues here that trust is the central issue between the clergy and the client. Keeping confidences facilitates trust. The breaking of confidences destroys trust. However, if the relationship between clergy and client cannot be trusted, can the client trust anyone? For Lebacqz, this is possibly the most disastrous consequence of breaking confidences: the harm caused to the client is that the client can no longer trust anyone. If one becomes vulnerable to a person who, ostensibly, occupies a position of safety and trust, and if that vulnerability is abused, the person cannot trust anyone.

Third, clergy keep confidences to avoid harming others, particularly third parties. Lebacqz correctly discerns the connectedness of life, and that the problems one person faces inevitably involves others as well. Maintaining the confidences of the client maintains the confidences of those persons who are significantly involved with the client. If, according to my thesis in this section, that disclosure involves a person's innermost secrets, it is virtually impossible to conceive of a disclosure that does not involve a significant person in the client's life. Therefore, the professional has a responsibility, not

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<sup>116</sup> Lebacqz, page 16-17.

only to the client who made the appointment, but also to the people interwoven into the client's life and issues. Maintaining the client's confidences serve to protect the interests of third parties.<sup>117</sup>

Thus, to summarize: the character of the professional relationship, where the professional seeks the good of the client above all else, creates a strong expectation to privacy. Trust, between the clergy and client is the key factor. The client discloses his or her most intimate and personal thoughts, feelings and perceptions, and becomes vulnerable and introduces unwitting third parties in this vulnerability. The professional, seeking the good of the client and the reputation of the profession in general, respects the vulnerability of the client. While such confidences are not absolute, the only usual reasons for disclosing them is to further the goals of the client.

### **Confidentiality in the Military Environment**

Before I discuss how the specific issue of confidential communications works its way out in the military context, I would like to briefly return to a point I made in discussing the definition of professionalism. Earlier in this chapter, I made the point that a military chaplain has a dual claim to professional status. To become a chaplain, one must already be a regularly ordained member of the clergy. This qualification presumes an individual possesses the Master of Divinity degree (or its equivalent) and be ordained into the ministry of a particular denomination. Thus, as a member of the clergy, the person is a professional. However, separate and distinct from these qualifications, the

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<sup>117</sup> A great example of this is marriage counseling. I have before me a client who is revealing the intimate details of the marriage. Yet this disclosure also includes matters concerning the non-participating partner.

military officer stakes a claim to professional status. Chaplain Jose Rodriguez quotes Paul Christopher, who writes:

Military officership is a profession, not simply a vocation. Part of what it means to be a member of a profession is having a deep commitment to a set of abstract values and principles that define the profession. This means that members of a profession accept certain values that are specific to their profession as being more fundamental than other values.<sup>118</sup>

Indeed, as one critically reviews some of the general definitions of what constitutes a professional, it would not be a difficult task to claim military officership as a profession in its own right.

Yet this dual claim to professionalism can, at times, be somewhat problematic and confusing. As a member of the clergy, the chaplain has certain commitments. One commitment, as I have demonstrated above, is an alliance with the client for the client's health and wholeness. The chaplain maintains a trust relationship with the soldier, and provides counsel to achieve the soldier's goal of solving a problem. As a professional military officer, however, the chaplain has a commitment to the Nation, to the Army, and to the command. The chaplain expresses this commitment by seeking the good of those entities because, in this professional role, these entities are his clients. The chaplain, as a commissioned officer, has sworn an oath to "defend the Constitution of the United States against all enemies, foreign and domestic [and] will well and faithfully discharge the duties of the office which [he] is about to enter."<sup>119</sup> The chaplain, in the professional capacity as an officer of the United States, places the good of the nation, the service, and the unit, above all else.

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<sup>118</sup> Rodriguez, Jose A. Ethics and the Army Chaplain. Th.M. Thesis. Durham: Duke University, 1997.

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<sup>119</sup> Department of the Army (DA) Form 71 (Dec. 88) Oath of Office – Military Personnel.

Yet these two professional roles and goals can easily conflict. A chaplain counsels a soldier. The soldier is new to the Army, but has a serious emotional problem. The chaplain accurately determines that the soldier cannot adapt to military life. Yet the soldier wants to be a soldier, although the command is recommending a discharge. What does the chaplain do? Which obligation wins out? Should the chaplain assist the soldier in staying in the Army? Doing so would certainly fulfill the client's needs. Or, should the chaplain recommend a discharge? A soldier who cannot adapt to military life does not contribute to the Army's mission, and stands in the place of another who could be more productive.

Or, consider the opposite situation. The soldier, new to Basic Training, is highly educated, emotionally stable, and talented. Yet he decides, about 10 days into Basic Training that he wants to leave. Yet the Army is short of such highly qualified enlistees, and has already invested tens of thousands of dollars to recruit, equip, outfit, and train this individual. How should the chaplain respond? As a clergyperson, the chaplain might sympathize with the soldier, and recommend discharge. As an officer, the chaplain may appeal to the soldier's patriotism and sense of "making a commitment" and use the relationship to convince the soldier to stay.

Both of the above situations relate to confidentiality – what of the person's life, details, goals, aspirations, strengths and weaknesses may be disclosed. Further, these issues raise the questions of *to whom* these details should be disclosed, and for *what* ultimate purposes. Yet both involve something deeper, as it pertains to the role of the chaplain as a professional. In both roles, the military chaplain has a legitimate claim to professional status. Each role, however, serves a different client, with different (and

sometimes opposing) goals, and fulfills different needs. Although I do not propose, in this thesis, to resolve these two problems, I raise them to illustrate the complexity of what it means to be a professional chaplain.<sup>120</sup> The chaplain will ultimately have to resolve his or her role and standing in each counseling circumstance. Probably not anticipating this particular problem, but certainly understanding the issue of defining where one stands, Lebacqz writes: “To define or specify a role is in part to specify a set of behaviors appropriate to the role and expected of those within it.”<sup>121</sup> The chaplain, who has two roles continually available, must decide which professional role is most appropriate in each given situation.

In anticipation of the reality that some communications are not legally protected from disclosure, but nonetheless realizing that society (and soldiers) function best when confidences are maintained, the Army recognizes this need in AR 165-1:

*n. Sensitive information*

(1) Sensitive information includes any nonprivileged communication to a chaplain, chaplain assistant, or other chaplain support personnel that involves personally sensitive information that would not be a proper subject for general dissemination. Examples of sensitive information are knowledge of a soldier’s attendance at an Alcoholics Anonymous program, treatment by a psychiatrist, a prior arrest, or hospitalization for mental illness.

(2) Sensitive information normally should not be disclosed unless the declarant expressly permits disclosure.<sup>122</sup>

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<sup>120</sup> Yet consider one possible way of addressing these problems. Commanders routinely seek the chaplain’s advice and recommendations about soldiers’ fitness and adaptability. The chaplain, who routinely works with and alongside soldiers daily, is often uniquely qualified to provide a commander candid insight about a specific soldier, because the chaplain has daily contact with the soldiers of the unit. Therefore, even without formal counseling with the soldier, the chaplain may have observations and recommendations. In this way, the chaplain bases such recommendations on the public behavior and deportment of the soldier, and not on private disclosures. The danger of this method, however, is the chaplain divorcing what he or she observes from what the soldier discloses.

<sup>121</sup> Lebacqz, page 59.

<sup>122</sup> AR 165-1, paragraph 4-3n.

In the previous paragraph of this regulation (4-3m, cited in Chapter 2), the emphasis was on the legally-defined privileged communications: under no circumstances should a chaplain disclose confidences made as an act of religion, or as a matter of conscience, without the consent of the soldier. It however, allowed disclosure that furthered the reason or purpose of the communication. Here, however, the scope of the communication is more sensitive and personal, but does not involve the confession of sin or matters of conscience. Indeed, as the regulation describes what constitutes “sensitive information,” the point is clear: sensitive communications involve the most intimate details of life. Thus, they should not normally be disclosed. Yet this paragraph, particularly in item 2, provides wise guidance: the chaplain should seek the client’s express consent (preferably written) before any disclosure is made.

Allow me to briefly revisit the issue of the soldier wanting a discharge. Suppose the soldier, instead of being highly qualified, is clearly failing to adapt to military life. The soldier wants out of the Army as much as the Army wants to eliminate the soldier. Since, however, such elimination requires convincing documentation, the soldier is sent to the chaplain. The chaplain, after listening to the soldier, concludes that the soldier wants out of the Army and that the Army would also be served by a discharge. The soldier asks for a letter from the chaplain, to the commander, to this effect – identifying the soldier’s mental or emotional state, and how that warrants a discharge. Although this is not a great dilemma, the chaplain must have the express permission to document his or her findings. (The wise chaplain will discuss his or her policy on confidentiality, and its

limitations, with each soldier, obtaining necessary consents, prior to beginning any discussion.)

Examining the regulation as a whole, it seems reasonable to conclude that the regulation anticipates the unique role the chaplain fulfills by stating that confidences (those not appropriately privileged communication) should not normally be disclosed, unless such disclosure furthers the goals of the person making the disclosure, and only with the permission of the person. While there may indeed be some exceptions, the Army, as well as the civilian community, follows the pattern of expecting privacy of clergy-client communications. This privacy, also similar to the civilian community, is rooted in the professional status of the chaplain.

### **Analysis and Principle**

My colleague, Terrence Walsh, examining a subject similar to this thesis, reminds us that the issue of clergy confidentiality is an issue or concern about *boundaries*.<sup>123</sup> Thus, during this final portion of my discussion of professionalism, I would like to allow this concern for proper and appropriate boundaries to be the framework for deriving an ethical principle. Boundaries pertain to how relationships are defined. They stipulate the terms of the relationship between the professional and the client. Some of these terms, or boundaries, are subject to negotiation (such as the duration, goals, outcomes and financial arrangements of the relationship). Other terms, or boundaries, are absolute (sexual relations with a client, etc.), and must not be breached under any circumstances. Yet if the expectation to privacy is indeed a boundary, where exactly does it fit? As I provide a

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<sup>123</sup> Walsh, page 3.

brief analysis of this section, and derive an ethical principle, I hope to establish such an appropriate boundary.

From the client's perspective, the professional represents power and authority. While the client may not be fully attuned to the scholarly definitions of what constitutes a professional, the client knows that to become one requires a great deal of training and expertise. Indeed, the client is perhaps somewhat struck by the aura respect the professional commands. At the very least, the client knows the professional is held out before the public as an expert in a particular field. Furthermore, the client understands that along with a high degree of education, the professional comes to the situation with the backing and credibility of others. The client may not understand the nuances of professional organizations, codes of ethics, licensure, etc., but he or she knows that somehow society (expressed through church, professional organization, or government entity) also values the work the professional engages in, and thus allows the professional the permission to practice. Thus, the professional, to the client, represents authority and power. If the professional is a member of the clergy, the professional has an even stronger claim to power. The client attributes the clergy's status and relationship to God as power and authority.<sup>124</sup>

But the client comes to the professional, as I have said, due to a pronounced need, void, problem, or situation in life. If the client indeed attributes power to the professional, this power is accentuated because the client comes to the situation with a sense of being vulnerable. Thus, the power differential becomes greater. Moreover, this power differential grows even more, due to what the client is required to do as a part of

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<sup>124</sup> Especially true in the military, where chaplains hold rank as officers, and where many "clients" are young, low-ranking enlisted soldiers.



the healing process: the client is required, often (particularly among the “counseling” professions – clergy, social workers, etc.), to expose or reveal the full range of their emotional selves. The relationship, therefore, starts at the point of a differential of power. This differential grows because the client is coming from the position of need. It further grows because the client, for the sake of healing, must strip himself or herself of dignity by revealing life’s most intimate details.

Thus, the client enters the situation as a person of need, with a great amount of weakness. He or she enters the relationship with a person who, through personal achievement and societal approval, represents power and authority. Yet the client enters the relationship because he or she perceives the professional has the power and expertise to solve the client’s situation.

Consider, though, the relationship from the perspective of the professional. While the professional considers and understands this differential of power, he or she has some other vital concerns as well.

The professional is truly concerned with being a person of help. Particularly among clergy, the professional derives power through the expectations and needs of the client. In a large sense, the church (the people of God) is where the professional clergy derives power. Without the church, the clergy would have little claim to power. Thus, the clergy, particularly, realize that without people, without someone to *serve*, they have little to offer. While it could be argued that people enter into the professions for personal gain (particularly medicine and law), I am convinced people enter the ministry because they are called by God to serve God’s people. Thus, the professional exists because people have needs, and he or she feels called to be a person of service. If this is true, then

the professional places a high value on serving the client's needs, for no other purpose than the client has needs to be met, which the professional, alone, can address. [This is a key point – for it completes my overall thesis. As confessor, the professional serves God; as counselor, the professional serves the law and society; and, now, as confidante, professional serves the client.]

Yet the professional is also maintains a commitment to the profession itself. This commitment is expressed in the desire to serve the profession by committing to the highest standards of expertise and ethics.

The professional wants to provide the best expertise he or she can, because such lends credibility to the entire profession. The professional knows that offering substandard care harms everyone engaged in the profession and consequently, harms the reputation of the profession among those who need the profession. Thus, the people who need the help the most will not receive it.

But even more important than providing superior care, the standards of ethic are probably the most crucial. Trust, as I have shown, is the essential characteristic of the professional-client relationship. The client may be mis-informed about the professional's expertise or specialized skills, but will continue the relationship if there is trust. The greatest harm or disservice the professional often creates, is behavior that breaks this essential trust.

The clergy's role is illustrative. As I have alluded to, the clergy does not offer one "type" of service, but the services members of the clergy typically offer encompass the entire range of helping professions. Clergy, depending on training, can offer services on a continuum from spiritual or pastoral counseling, all the way to psychotherapy. The

client may not know where, specifically on the continuum, a particular clergyperson's skill resides. He or she does, however, make an assumption that members of the clergy perform counseling, and if the client feels that "counseling" is called for, he or she will seek the clergy out. Thus, the client seeks the clergy's skill based on a generalized level, and enters the relationship *because of who the clergyperson is as a person*. This, then, returns us to the opening of this section, and the words of Karen Lebacqz: "The Christian minister must 'be' something before he can 'do' anything ... his work depends on his personal character."<sup>125</sup> The clergy "is" something to the client. This sense of being is predicated on trust.

If the relationship is based, fundamentally, on trust, then trust becomes the *boundary*. Thus, I argue that the maintaining of confidences is the one issue or boundary where this trust is most evident, and where its lack is the most pronounced. The client's full and complete honesty to the professional is required for the professional to adequately provide help. This full and complete honesty involves, as I have stated, the client sharing his or her most intimate, revealing thoughts. Since these thoughts and perceptions represent, to great extent, the persona, the psyche, the soul, of the person, the careless revelation of these (on the part of the professional) is possibly the most grave error of all. Not cherishing the dignity of the vulnerable person can destroy the person. Keeping the client's confidences, then, is the greatest contributor to the essential trust of the relationship.

The duty, however, to maintain such confidences, clearly belongs to the professional. Gula writes: "The greater burden of responsibility for maintaining

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<sup>125</sup> Lebacqz, page 65.

boundaries falls on the one with the greater power.<sup>126</sup> The professional is clearly the one who possesses the most power. Furthermore, since the information the client routinely shares in counseling is usually not legally protected from disclosure (unless it is a crime) or theologically “under the seal,” the only motive or impetus the clergy maintains for keeping the client’s confidences is the clergy’s commitment as a professional, and to a code of ethics that arises from professional status. Reduced to its simplest terms: the professional clergy maintains the confidences of his or her clients, because he or she has an unfailing commitment to seek the client’s good. The law may not prevent disclosure. Church discipline may or may not prevent disclosure. The clergy’s commitment to the good of the client, with trust as its basis, is that which is strongest, and overriding in preventing disclosure.

Thus, I am now prepared to offer my third and final ethical principle:

**Power and trust are the essential factors of the relationship between the clergy and his or her client. The clergy always has the greater power. The clergy must exercise that power professionally, as he or she holds the very life and soul of the client in his or her grasp. Crucial to maintaining trust, is the clergy maintaining the confidences the client entrusts. Therefore, the presumption falls heavily on the clergy maintaining all confidences. In the exceptional situation justifying disclosure, the overriding motivation is the client’s well-being.**

I premise this ethical principle on the condition that the professional serves the client’s best interests. I also recognize the possible existence of situations where disclosure of some portions of the client’s utterances may serve the client’s best interests – especially in terms of referrals and potential self-harm. Yet the presumption (as Gula stated earlier) is that confidences, as a rule, should be maintained.

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<sup>126</sup> Gula, page 134.

This principle I have expressed directly arises from the clergy's commitment to being a professional, and consequently, his or her unflagging commitment to the client. I recognize, however, that some clergy, particularly in specialized ministries (such as the military chaplaincy) face competing expectations. As a professional clergy, such a person steadfastly keeps confidences. The expectations arising as a military officer may not have this keeping of confidences as a goal. Therefore, the military chaplain faces some unique issues. Since the military chaplain was a clergyperson before becoming a chaplain, and will remain a clergyperson after release from military service, the clergy's concept of professionalism will generally override. Yet I believe AR 165-1 acknowledges, and does not contradict, my principle that the clergy, as a presumptive rule, maintain the confidences of the client.

## Chapter 4

### Application of Principles

The time has finally come to answer, or at least respond to the issues I have raised. In this final chapter, I shall show how the three ethical principles I developed can be creatively applied. After posing the question of “what time is it,” and responding with 80-some pages of instruction of “how to build a clock,” perhaps now, I can provide the answer to the initial problem I created. I want, however, to make several initial observations before entering into the realm of specific application.

First, allow me to return to the opening scenario. I consider the events I depicted as realistic and common situations military chaplains face. Yet I designed the situation in such a way as to involve multiple, overlapping, and competing issues and values. I did this intentionally because this is how life, and people’s situations, are presented to us. Therefore, as I apply the principles I created, I understand no one principle exactly fits – precisely because few pastoral conversations involve *only* a spiritual, or legal or professional issue, but usually include some aspects from each of these venues. Furthermore, each venue possesses some inherent, though competing values. I do believe, however, that my principles, if applied concurrently, will yield an overall consistency. I am confident that if a clergyperson is unsure about the boundaries or the expectations of confidentiality in a given situation, applying these principles will greatly clarify the pertinent issues, and reconcile the competing values.

Second, I am confident that by applying these principles, the professional clergy will be able discover the “right answer.” I realize this is an ambitious claim, but I believe that in most situations, there is indeed such a right answer. Initially, these ethical

principles begin as a way to assist the clergy to “ask the right questions.” There is an inherent value in knowing the right questions to ask. These right questions will cause the clergy to critically reflect on the dynamics of the particular situation he or she is facing, and then make a decision as to the substance of the conversation. The clergy or chaplain will thus be able to determine what aspects of the conversation before him or her involves confession of sin, legal issues, or sensitive information. With this determination, the clergy will know what values are at stake, who is being served, and therefore, he or she can decide which of the specific principles are most germane. Thus, the clergyperson will know how the particular venue (theological, legal, or professional) resolves the issue of confidentiality, and what those limits might be. He or she will also discover that each principle contains a general, but not absolute predisposition to privacy, though arriving at that predisposition from a different perspective and with different exceptions. I therefore expect that as one applies these principles, they will discover a theologically defensible, legally appropriate, and professionally correct answer. Armed with this answer, the clergy must now only decide the character of the information, and which principle is most applicable. With this knowledge, the clergyperson will have the ability to defend his or her position or decision, when confronted by situations or persons who pressure him or her to betray the confidences of hurting people.

Third, I have not created these principles to be a “litmus test,” in the sense that they constitute a three-pronged checklist or decision matrix. Nor is it sufficient that the clergy merely know the correct answer. The correct answer, to have value, must be translated to the concerns of the client. Using my model, the pastor or chaplain can accurately determine the legal, religious, and professional bounds of privacy. But does

the clergy having this knowledge serve the client? By understanding and applying these principles, along with their theoretical bases, the chaplain or pastor can advise his or her client with a full understanding of the pitfalls and limitations of privileged communication. I expect any pastoral conversation to include the subject of confidentiality. The client need not be inundated with all possible nuances and limitations. The clergy, however, as a part of his or her technical expertise, must at least advise the client as to the bounds of confidentiality as they relate to the specific situation at hand. The principles I offer give the clergy the resource for doing that.

Furthermore, I suggest at various points in applying my principles, some creative, pastoral ways for maintaining confidentiality while simultaneously assisting the client. My principles establish that in most cases, clergy confidentiality is absolute. The clergy must not divulge the client's confidences under any circumstances. Yet for the healing of the client, I recognize that sometimes a limited disclosure is needed, or helpful or warranted. Such disclosures may not involve the specific details of the issue, nor the identity of the client. Nor will such disclosures even originate with the clergy. They may, though, involve information necessary in moving the client in the direction of healing or restoring relationships. I offer, in applying my principles, ways in which this can take place that do not involve the clergy violating a confidence, but move the client toward healing. Often, these ways involve the clergy leading the client to self-disclose, as a part of the healing process.

Finally, these principles will assist the clergy in understanding and clarifying the multiple role expectations they fulfill. While the clergy is, above all, a servant God, sometime lesser roles compete. Or others, who do not share the clergy's commitment to



God, attempt to impose their role expectations onto the clergy. The military chaplain, for example, discerns the call of God to serve the soldier with unquestioned zeal and enthusiasm. He or she, however has sworn an oath to the Nation and the Army, and thus, owes loyalty to those entities. Pastoral clergy, similarly, are not exempt from similar competing loyalties. As a pastor serving a church, clergy often face the same issues: the goals for the client or parishioner may conflict with the good of the church. [I will not solve this as an issue, but consider how a pastor might respond if a parishioner “confesses” that he or she has been embezzling funds from the Church treasury.] Through applying my ethical principles, I trust the clergy will be able to address these competing loyalties without compromising his or her integrity.

Now, let us apply these principles to the situation at hand.

### **Confession as Sacrament – The Chaplain as Confessor**

In Chapter 1, I developed the argument that the chaplain, as God’s representative, is a mediator of God’s forgiveness. In this capacity, the person sees the chaplain as having a special relationship with God, and the act of confession, itself, is sacramental in nature. Consequently, I developed the following principle:

**As the office of clergy represents power, those who occupy that office must exercise that power *responsibly*. In this ethical principle, the source of this power derives from the clergy’s relationship with God. The clergy seeks to proclaim the word of God in hearing the concerns of people.**

As we consider the opening scenario, and apply this principle, we must first deal with this question: what aspects of SSG Smith’s conversation with his chaplain constitute the confession of sins? In this area, I want to focus on what it means to exercise power

*responsibly*. My use of this word centers around the clergy being faithful to God in understanding the sacramental nature of the confessional. Therefore, while the strongest expectation to privacy exists, the works of forgiveness and reconciliation, attributed to penance, are integral, and must be achieved.

Conceivably, one could argue that most of what SSG Smith discloses is confessional. He knows the chaplain is a religious functionary. Although I purposefully omitted the chaplain's religious background from the situation, most courts and authorities look to the clergy's faith and church discipline to judge the communication, and not the faith of the person making the confession. But the reality is that SSG Smith probably esteems the office of "chaplain." He would have probably not disclosed the matter to anyone except the chaplain. Additionally, Tiemann states that "religious communities and religious communities alone, have the right and the responsibility for determining the answers to such questions" of the character of the confessional.<sup>127</sup> Whether the conversation is a confession, an act of religion, or a matter of conscience usually belongs to the *clergy* to decide. Moreover, although SSG Smith could have many other motives in confessing his adultery, based on this limited conversation, those motives are not readily apparent. Thus, the clergy can legitimately make the *initial* presumption that the soldier is offering a confession, and/or making the declaration as a matter of conscience. Furthermore, the declaration meets the test Walsh identified, in that Smith is confessing a "particular" sin.<sup>128</sup> Implicit in this, however, is that clergy and client, while perhaps theologically differing, understand there is a spiritual dynamic in the relationship.

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<sup>127</sup> Bush and Tiemann, page 135.

<sup>128</sup> Walsh, page 5.

However, there is one factor that contravenes the idea that this may be a confession of sin. Confessions of sin are private, between priest and penitent only. The presence of Mrs. Smith in the chaplain's office may indeed void the act of confession. A confession, theologically understood is private. It is, in essence the person approaching God, through the mediation of the priest. The presence of a third person may indeed destroy the sacramental nature of the confession.

In spite of this, if the clergy deems that Smith's declaration is a confession of sin, then clearly, this matter commands the highest of secrecy. The chaplain must not disclose the matter under any circumstances. But if it is to be kept secret, how can the clergy fulfill his or her role as a spiritual advisor, as well as maintaining the good of others (society, the unit, the marriage, the other woman)? I contended in my principle that the clergy has *power* as representing God. This power can be expressed *responsibly*. For instance, the result, or the consequence of the sacramental act of confession is penance – the prescribing of some work to effect full and complete forgiveness. The clergy's power, and thus his or her ability to meet multiple role expectations, resides in this arena. If Smith is expecting grace and forgiveness, it must not be cheap grace. Furthermore, any penance must be tied to the "sin." Therefore, if Smith is expecting forgiveness, he must be willing to receive a penance that flows from his sin. His penance, obviously, must first be the breaking of the adulterous relationship with PV2 Jones. Further, the chaplain, in offering God's forgiveness, might consider using the power and persuasion of his position to encourage SSG Smith to take responsibility for his actions by admitting to them to his commander. Although this sounds harsh, and could bring SSG Smith under prosecution, if he is truly penitent, he may find absolution

and inner peace by taking responsibility for his actions. Yet this is Smith's decision – the chaplain can use the power of the confessional act as a way to encourage SSG Smith to come clean. But beyond such encouragement, any decision to publicly disclose adulterous behavior belongs to SSG Smith. This unburdening, both privately and publicly, serves Smith. He is no longer living in a deception. Further, it serves the unit. He, in this situation, has violated boundaries and diminished trust in leadership. This act helps restore those boundaries and trust. It may also assist in healing his marriage, by illustrating his candor in wanting to no longer be involved in deception.

I recognize this course of action may be highly unlikely to achieve. Yet it is one illustration of how the clergyperson can exercise his or her confessional responsibilities and power, bring healing, and offer a legitimate forgiveness to a person who has destroyed trust and faith.

The issue, here, is that as one who represents God, the clergyperson hears confessions, but then offers the person the possibility of restoration. Such restoration should have, as its result, the healing of the relationships that have been broken or abused. Since the clergy represents God, the clergy has power – the person confessing to the clergy perceives this power most of all, otherwise there would be no confession. The clergy declares God's word by offering a forgiveness that matches the circumstance of the sin, that brings to light those things hidden in darkness, and restores proper relationships. Of course, once the confession is made, the clergy must keep maintain secrecy – but he or she can use the persuasion of his or her office to allow the sinner an avenue to achieve full reconciliation.

Thus, exercising the power of forgiveness *responsibly*, then, is not cheap grace. If, indeed, the clergy understands the profound nature of sin, the forgiveness will be equally profound, and must match the character of the sin. Furthermore, if such sin results in violating boundaries, any forgiveness must have the reestablishing of those boundaries as the goal. Similarly, if appropriate and healthy relationships were broken, forgiveness must involve reconciliation. Additionally, the penitent must not use the act of confession to avoid personal responsibility for his or her actions, but must instead, fully accept such responsibility. The clergy must call the penitent to this responsibility.

### **Privileged Communication Under Law – The Chaplain as Counselor**

Chapter 2, while mostly about legal issues, presented the idea that there is inherent value in some societal relationships. Based on the premises that free and honest communication between certain parties creates healing, and that such relationships benefit society, the concept of privileged communication arose as a legal principle. While privileged communication is intended to be private, the protection it offers pertains only to testimony in legal proceedings. In other words, the only privacy it offers is what it allowed to be admitted as legal evidence. As I presented this type of communication, I developed the following principle:

**Society has placed value in the relationship between the clergy and the penitent. Those who occupy the office of clergy must exercise their office *judiciously*. Society has determined that private confession, in most circumstances, is preferable to disclosure, because such privacy serves the good of the entire society. This preference, however, is legally defined, and is not absolute. The clergy must discern the legal issues, while weighing by other values recognized by society.**

Crucial to understanding this issue and principle is the clergy defining what is at stake. In the opening scenario, the chaplain understands that on at least one level, there are several legal issues apparent. SSG Smith admits to adultery, a crime under the UCMJ.<sup>129</sup> Furthermore, he is probably violating Army policy against fraternization, by having an improper relationship with a subordinate. Moreover, considering the power issues of age and rank, one could easily make the case that SSG Smith is committing sexual harassment. The chaplain must first understand that there are profound legal issues involved. SSG Smith's behavior is illegal in several areas. He also potentially faces the civil issue of divorce.

Yet, in my principle, I think it crucial to consider the word *judiciously*. In this section, I apply the term as it has to do with the clergy understanding the pertinent legal issues and guiding the clients accordingly, through establishing the proper limits of the relationship.

As the chaplain hears the situation unfolding, the first task, it seems, is to clarify the relationship with the clients. While I have stated, and believe, that SSG Smith feels safe in confiding to the chaplain, the chaplain needs to be clear and specific with the couple on the limits of such confidentiality. Since the general rule, in the military, favors the privilege if performed as "a formal act of religion or as a matter of conscience," the chaplain must establish those criteria as the boundaries for the conversation.<sup>130</sup> He or she must, for the couple's protection, explain from the outset of the interview, the legal limits

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<sup>129</sup> The military does indeed prosecute soldiers for adultery, and confinement is indeed a real possibility. The military's rationale is that adultery is contrary to "good order and discipline."

<sup>130</sup> MRE 503.

of confidentiality.<sup>131</sup> If the ground rules of the counseling situation are thus established, the couple knows what to expect.

A crucial part of this conversation may also include the fact that not all jurisdictions recognize the privilege when conducted in the presence of third parties. As this is event appears to be marriage counseling, the presence of the spouse is that third party. The chaplain will want to be familiar with the particular laws governing his or her particular jurisdiction, and advise the couple appropriately. Most states do not recognize the privilege if a third party is present. The military rule is untested in this area.<sup>132</sup> The chaplain must enable the clients to understand that what is privileged for the military might not be privileged in state courts.

The chaplain, must further, for the sake of both clients, agree (or contract) with the couple for them not to discuss the counseling situation outside this counseling relationship, unless appropriately referred. Such an agreement would prevent the danger of one spouse using the information gained in counseling against the other. Consider the North Carolina case in Chapter 2. The wife, in marital counseling, learns of her husband's affair. She then sues for divorce, under grounds of adultery, on the basis of the knowledge she learned in counseling. While North Carolina disallowed the testimony, other states have not faced similar situations. Thus, for counseling to be successful, the chaplain must create an environment where the couple feels safe from each other.

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<sup>131</sup> Most chaplains, in conducting "intake" prior to formal counseling, request the clients sign a written acknowledgement of the policy of confidential communications. This should be a requirement.

<sup>132</sup> In North Carolina, by court precedent, marriage counseling does not trigger the third-party issue (Tiemann, page 140). To my knowledge, MRE 503 has not been tested for this issue. If I were an attorney (which I'm not), I would argue that the phrase "in furtherance of the communication," allowed disclosure in the presence of the spouse, because honesty in counseling furthers the confessing client's goals. This is not, however, a legal opinion, and does not relieve the chaplain from honestly disclosing the limits of privileged communication. The protections of MRE 503 would not apply in civil divorce proceedings.

Another crucial aspect of the relationship is the chaplain clarifying his role as spiritual advisor. The privilege clearly applies in spiritual counseling. If, however, the clergy moves into the venue of a more secular marriage counseling (in which he may not be adequately trained or licensed), he or she may lose the privilege of MRE 503 and similar state statutes. While there are state statutes offering the privilege for marriage counseling, one must be trained and certified in that field to engage in it, and to claim that privilege. (Similarly, one must usually be ordained, a bona fide member of the clergy, to claim the clergy privilege.) The clergy must declare, and the couple must understand, what role the clergy is fulfilling, and what limits might apply to that role. If the needs of the couple go beyond the chaplain's expertise, or moves beyond the spiritual realm, the chaplain must therefore be prepared to refer the couple to a more appropriate agency.

A more difficult aspect of the relationship in this arena is that the clergy must balance his or her sense of ethics with those of the client. Since privileged communication, specifically, is a fiduciary relationship where the client's good is sought, clergy must seek the client's good, even though that good might conflict with the clergy's sense of ethics. Keeping the client's confessions private does not equate with endorsement of those behaviors. Specifically in the realm of privileged communication, the clergy will often learn of knowledge that conflicts with his or her religious values. The clergy must realize that keeping these confidences serves a greater good than disclosure. The chaplain, in this scenario, strongly opposes adultery. He or she also sees the pain, frustration, and morale problems in the unit the behavior has caused. Respecting SSG Smith's privacy may seem to endorse his behavior, because it allows him to get away with it, unpunished. Even if that were the result, disclosing it would



cause greater harm. If the chaplain is loose with private matters, soldiers will not utilize the chaplain. If soldiers do not utilize the chaplain, the soldiers are not being served.

A second task, as it were, in exercising the clergy's office judiciously, does not involve the clients, per se, but has to do with the clergy's dealings with others. In this situation, the commander, CPT Horn wants to use the chaplain, and the willingness of SSG Smith to confide in his chaplain, as a way to serve her own purposes. She wants to "get to the bottom" of certain rumors, and believes that Smith will confide in the chaplain, and thus, she easily gets the information she needs. The essential task, therefore, becomes instructing those in the society, or community in which the clergy or chaplain operates, the limits and rules of privileged communication. Clearly CPT Horn is attempting to use the chaplain inappropriately. She wants to use the chaplain as an investigating officer. The chaplain should, then, respond by informing CPT Horn on the issues involved, and that she should use other sources to develop the information she requires. This is a possible answer, but it is reactive – it comes after the situation arises. Better, though, is for the chaplain, upon assuming the position in the unit, to brief all commanders and leaders on the issue of privileged communication. He or she must explain the rules in advance, so that when leaders utilize the chaplain for their soldiers, they (both leader and soldier) know the strong expectation to privacy that exists. Thus, soldiers can use the chaplain in confidence and trust, and leaders will not misuse the resources the chaplain offers. One reason for writing this thesis is that some chaplains do not understand all the issues involved. An equal concern is that unit leaders are also often misinformed. The chaplain, as the subject matter expert in the spiritual realm, has the duty and obligation to inform leaders about the issue of privacy of communications.

Clergy serving parishes also face this issue. Indeed, the parish minister often knows more about some parishioners than anyone else. Yet when it comes time to nominate people to responsible positions in the church, what the clergy knows may raise a concern about a person's fitness, but this concern must not be disclosed. Parish clergy must teach their congregations about issues of confidentiality, so that they can work together in an environment of integrity and trust.

Common knowledge suggests that courts, even military courts-martial, are reluctant to press the issue of clergy testifying.<sup>133</sup> To do so places the court in a precarious 1<sup>st</sup> Amendment situation of deciding the legitimacy of religious acts and sacraments. Hence, especially if the information is available from other sources, clergy usually will not be called to testify. However, the clergy, representing society, must understand and appreciate the great role he or she fulfills. The danger in disclosure not only harms the client, but also harms all who would seek help from clergy. The benefit of many people trusting their clergy is greater than the one situation that might justify disclosure.

### **The Professional Relationship – The Chaplain as Confidante**

In Chapter 3, I considered the professional role of the ministry. While there are few, if any, legal requirements to maintain the secrets of the client, there are, nevertheless, strong professional sanctions. These sanctions flow from the definition of the role of professional. The professional perceives an inherent value in the services he or she offers, and thus, has a commitment to the client. Further, the professional has a

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<sup>133</sup> I base this on the scarcity of cases where the clergy-client privilege has been tested, and that there is only one US Supreme Court case on the subject.

commitment to the profession itself, and maintaining a code of ethics contributes to the profession. These sanctions also flow from the relationship the clergy and client creates, built on a foundation of trust. In this regard, I offered my third ethical principle:

**Power and trust are the essential factors of the relationship between the clergy and his or her client. The clergy always has the greater power. The clergy must exercise that power *professionally*, as he or she holds the very life and soul of the client in his or her grasp. Crucial to maintaining trust is the clergy maintaining the confidences the client entrusts. Therefore, the presumption falls heavily on the clergy maintaining all confidences. In the exceptional situation justifying disclosure, the overriding motivation is the client's well-being.**

In developing this principle, it is important to remember that the entire relationship is built upon trust. The client places trust in the clergy's expertise and in the clergy's commitment to the client's best interests. The client demonstrates this trust by disclosing his or her innermost secrets – some of these secrets no-one else in the world may ever know. But also, when the client comes to the clergy, it is always in a state of vulnerability. The professional represents superior knowledge, and the client comes with a crisis or need. Thus, in many ways, the clergy controls the relationship, making the trust of the client imperative, if the outcomes of the relationship are ever to be achieved. This is particularly true in the Army, where, in a battalion, the chaplain is normally a Captain. This rank differential can be a considerable inhibitor to the free and open communication necessary for healing. The chaplain, occupying a much greater position, must demonstrate his or her concern for the couple to such a great extent, such that it overrides such a power imbalance. Therefore, the professional clergy must recognize the definite power issues involved in the relationship, and exercise that power and authority *professionally*, though seeking the best for the couple.

The word, *professionally*, as I define it, can mean several things to SSG and Mrs. Smith.

First, it means that the chaplain has a commitment to healing the relationship with the couple. While the couple did not initially seek out the chaplain (but were “command referred”), once they are in the situation, the chaplain sees a definite need of healing in the relationship. The factors that brought the couple to the chaplain are largely immaterial; once they establish a relationship in counseling, the chaplain understands (and the Smiths must realize) that their good, their healing, and their well-being are crucial to the chaplain. This commitment creates a fiduciary relationship between clergy and client. It will take more counseling to determine the form that well-being might take. The couple may indeed want to reconcile. Or, this counseling may represent the last chance for the couple before the imminent divorce. Either way, the chaplain, as a professional, has the singular goal of the couple’s healing (as a couple, or as individuals). Practically speaking, while the Smiths made their appointment with the chaplain because of a command referral, they fulfilled their commander’s directive by merely arriving. The extent to which they continue is their decision. The chaplain owes the Smiths the obligation to only continue counseling at the Smith’s request. As soon as the couple arrives, the chaplain might indeed state that regardless of why they came, they can now feel free to stay or leave. If they choose to stay, the chaplain serves their interests and their interests alone.

Also, the word, *professionally*, communicates to the Smiths certain assumptions about the chaplain’s training and expertise. The Smiths may not know of the special skills the chaplain has. They know, however, that he or she has considerable experience

and skill in human relationships. Yet the chaplain must understand his or her own skill and expertise, and honestly disclose to the Smiths what his or her limitations are. If the couple's needs are greater than what the chaplain can offer, the chaplain must be honest with that fact, and make an appropriate referral.

The word, *professionally*, finally suggests to the Smiths, that the chaplain will respect their privacy. Let us, for example, disregard SSG Smith's admission of adultery, and CPT Horn's motives for referring the couple to the chaplain. Suppose, instead, CPT Horn refers them because she is deeply concerned for their marriage. Still, under these circumstances, what must the couple do? They must, for counseling to be successful, confide in the most intimate details of their life and marriage. The embarrassment of these details being revealed would be enormous. Thus, they must rely solely on the professional character of the chaplain in respecting their privacy. Trust in the personal integrity of the chaplain becomes the critical factor for healing. The couple places an enormous trust in the chaplain. If the couple cannot trust the chaplain, they will not be honest and forthright. Without this honesty, the counseling will not be effective.

Therefore, the Smiths must have absolute confidence in their chaplain. While there are some exceptional circumstances that may justify disclosure, these circumstances are rare, should be done with the couple's permission, and for the benefit of the couple.

Yet in the chaplain's professional role, he or she has an obligation to the unit. By virtue of being an Army officer, the chaplain must consider the well-being of all soldiers. This responsibility is somewhat troubling because it may work at cross purposes to the Smiths. Adultery among soldiers is a significant morale issue. Rumors about fraternization undermine confidence in leadership. The chaplain knows that morale and

leadership issues detract from the effectiveness of the unit. Such detractions in peacetime, are debilitating enough, but can, in combat, be deadly. Thus, the chaplain, acting *professionally*, must engage these issues and apply his or her expertise to them, while at the same time continuing a fiduciary relationship to the Smiths. In essence, the chaplain is counseling two clients, the Smiths and the unit. Each client has different needs and agendas, but each client expects the chaplain to place their interests above all others. This creates a definite paradox for the chaplain. How can the chaplain fulfil each role, without compromising either?

Perhaps the first way to deal with this paradox is to establish boundaries with the chain of command. I argued in the previous section that it is imperative for the chaplain to brief the chain of command about privileged communication issues. The unit commanders (battalion and company) and other leaders need to know the limits and restrictions relative to disclosing private information. Here, however, I argue for an additional and greater establishment of the boundaries of the professional relationship. This boundary centers around the role of the chaplain. CPT Horn wants the chaplain to assist her in an investigation. I do not attribute this to ulterior motives, but to her misunderstanding of the role of the chaplain. She thinks she needs the information the chaplain has, but she is actually operating at cross purposes to her own needs. She thinks she needs an investigation. She really needs a chaplain. She thinks, for the good of the unit, she ought to “hammer” SSG Smith. This may assist the unit in some issues and solve an immediate problem, but she will *always* need a chaplain. If the role of the chaplain is misused, the office of chaplain becomes useless and ineffective. Soldiers who cannot trust the chaplain will not use the chaplain. If soldiers cannot use the chaplain, the

entire unit will now lack the very commodity that could be the greatest asset in unit morale. Here, then, the chaplain needs to be frank with CPT Horn. The cost of disclosure may be greater than the commander realizes. What she might gain, in terms of information about SSG Smith's behavior may cost her the effectiveness of the unit chaplain. Her pressuring the chaplain to disclose will result in other soldiers not using the chaplain, especially since her pressure will be ineffective. This is especially unfortunate in that the information CPT Horn needs is readily available elsewhere. With rumors of the affair abounding as they are, she really does not need the chaplain. Other, non-privileged sources are readily available. I submit, therefore, that this conversation with unit become an initial, and essential, component of the chaplain's ministry. The chaplain establishes the boundaries of the relationship such a way as to serve all clients best. With regard to this scenario, the chaplain, by not disclosing, exercises his or her fiduciary responsibility to both client and unit. The couple's secrets and details of their marriage are maintained, and the unit retains an effective chaplain.

There is, however, a second way the chaplain can resolve this paradox. The chaplain does not have to discuss the intimate details of people's lives to address the acute needs of the unit. While SSG Smith's relationship with PV2 Jones may indeed cause morale and leadership problems in the unit, and may create a hostile environment, other contributing factors possibly exist. SSG Smith's adultery may be an isolated incident, and due to SSG Smith's lack of integrity. It may however, be symptomatic of leadership failures within the unit. The unit leadership may have not effectively communicated Army policy. The chaplain can recommend this oversight to command. Similar situations in the unit may not have been appropriately addressed, thus creating the

impression that such behavior is tolerated. Thus, while the chaplain must not address the specifics of the Smith's situation to CPT Horn, he or she can (and must) inform CPT Horn of trends and leadership issues that affect unit morale. The specifics of the Smith situation are not critical or necessary to CPT Horn if the chaplain discerns that flaws in overall unit leadership contribute destructive marriages and illicit affairs. I am suggesting here that the chaplain can indeed maintain the boundary of confidential communications while also serving the entire unit. CPT Horn may need to know that there are greater problems in the unit than the Smith's. The chaplain is the singular person in the unit capable of advising her in this regard.

The chaplain can accomplish this task through several methods. Counseling the Smiths may alert the chaplain to the problem. His or her informal conversations with unit members (during road marches, in the Motor Pool, on the Firing Point, etc.) may also be illuminating. As far as this situation is concerned, others in the unit have already sought advice from the chaplain.<sup>134</sup> The chaplain also has the resource of conducting command climate surveys and using other instruments. The bottom line is that the chaplain is responsible for serving two clients: the unit and the Smiths. The Smith's situation is only a symptom of a greater issue. The chaplain can serve both parties' interests by sharing non-personalized information with the commander.

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<sup>134</sup> One issue I have not dealt with is the situation of a soldier approaching the chaplain with rumors or allegations about a third party. There is little legal or theological expectation to privacy when a soldier says: "Chaplain, I've heard rumors about ... but please keep my name out of it." Sacramentally, the person is not confessing his or her sin. Legally, the person cannot rely this being privileged communication, because the person is not confessing his or her individual behavior, but the possible behavior of another. It is usually not sensitive information either, because the person is not disclosing his or her most intimate thoughts, but the alleged actions of another. The wise chaplain will exercise restraint and discretion here, but clearly making the person understand that such a conversation may have to be revealed, if the problem is to be solved.



### **Concluding Remarks**

As I opened this section of application of principles, I confidently stated that my three ethical principles could be used by clergy to determine the “right answer” in issues related to confidential communications. I sincerely hope I have been convincing in this regard. My strong impression, which I believe my research establishes, is that privacy is a generally accepted, and perhaps a normative guideline in the clergy-client relationship. For many reasons, as I have identified earlier, clergy should strongly resist divulging any information entrusted to them, unless such disclosure serves the best interests of the client, or may be required due to the unique ministry setting (the chaplaincy, for instance) or by competent legal authority. In the latter situations, the clergy is wise to seek legal or professional advice before making a decision to disclose. In this regard, I trust this thesis has been helpful.

My goal throughout this thesis has been to offer an opportunity for the professional to critically reflect on the timely issue of a specific ethical problem in ministry: how to deal sensitively, judiciously, and responsibly with the lives of people, and after that reflection, determine the correct response. People, undoubtedly will confide in clergy, when they may not confide in their spouse, parents, children, or anyone else. It has been said that “knowledge is power.” If that is true, then the typical clergyperson has considerable power, because he or she has considerable knowledge about the lives of his or her parishioners, clients, or soldiers. Yet the clergy must maintain an unwavering commitment to the health and well being of those who have committed their trust. The essential pastoral responsibility, it seems to me, is this

maintaining of trust – and how the clergy deals with the very lives of his or her people, is the test of that trust. Therefore, as clergy, called to serve God’s people, we must remember that how we minister to people becomes the character of our ministry. If I have triggered, in this thesis, a pastoral concern for people, then I have been successful.

My second goal was to deal with a very practical issue: in my 12 years of being a chaplain, I have experienced a number of general misunderstandings about the concept of confidential communications. Some chaplains think any conversation with the chaplain, under any setting or context is privileged. Therefore, they miss the opportunity to assist the soldier through referral, and they miss their obligation to advise the commander on critical issues facing the unit. [The chaplain counsels a soldier about the soldier’s propensity to physically abuse his wife. The chaplain feels the conversation is private, and neither refers the soldier or informs command. The soldier, later, seriously assaults his wife, and the inevitable question arises: “Who knew what, and when?”] Or, the chaplain deems it necessary to disclose too much: he or she loses credibility with soldiers and leaders alike. When soldiers and leaders cannot trust their chaplain, the unit is essentially without a chaplain. Or, the chaplain does not recognize the differences in the types of confidential conversations, and their corresponding expectations to privacy. As a result, when faced with a legal situation involving the soldier, the chaplain does not know how to respond, and becomes the subject of legal proceedings. Thus, if through this paper, the reader can know what vital issues are at stake, and indeed knows the “right questions to ask,” I have been successful. The real goal, however, is to move clergy from knowing the “right questions to ask,” to a confidence in knowing “what the right answer is.” I trust clergy who read this work will develop this confidence.

Finally, I wanted this work to be an easy reference for professional clergy. Therefore, in the Appendix, I have included statutes of all 50 States, along with special sections concerning child and elderly abuse. By including this, the clergy can easily become informed on the state laws pertaining to his or her jurisdiction. This may not be as helpful to a minister who serves an entire career in one state or Annual Conference, but for the military chaplain who moves quite frequently, this compilation of statutes can be helpful. If a clergyperson or pastor is better informed through this paper, I have been successful.

**APPENDIX 1**  
**State Statutes on Privileged Communications**  
**(Copied From Bush and Tiemann, The Right to Silence, pages 223-247)**

**ALABAMA**

Ala. Code Tit. 12.21.166

Confidentiality of Communications with Clergymen

(a) As used in this section, unless a contrary meaning is clearly intended from the context in which the term appears, the following terms have the respective meanings hereinafter set forth and indicated:

(1) Clergyman. Any duly ordained, licensed or commissioned minister, pastor, priest, rabbi or practitioner of any bona fide established church or religious organization and shall include and be limited to any person who regularly, as a vocation, devotes a substantial portion of his time and abilities to the service of his respective church or religious organization.

(2) Legal or quasi-legal proceedings. Any proceeding, civil or criminal, in any court, whether a court of record, a grand jury investigation, a coroner's inquest and any proceeding or before any public officer or administrative agency of the state of any political subdivision thereof.

(b) If any person shall communicate with a clergyman in his professional capacity and in a confidential manner (1) to make a confession, (2) to seek spiritual counsel or comfort, or (3) to enlist help or advice in connection with a marital problem, either such person or the clergyman shall have the privilege, in any legal or quasi legal proceeding, to refuse to disclose and to prevent the other from disclosing anything said by either party during such communication.

**ALASKA**

Alaska Civ. Rule 43-h (3)

Confessor-Confessant Privilege

A priest or clergyman shall not, without the consent of the person making the confession, be examined as to any confession made to him in his professional capacity, in the course of discipline enjoined by the church to which he belongs.

**ARIZONA**

Ariz. Criminal Code 13-4062

Anti-marital Fact Privilege; Other Privileged Communications.

A person shall not be examined as a witness in the following cases:

3. A clergyman or priest, without consent of the person making the confession, as to any confession made to him in his professional character in the course of discipline enjoined by the church to which he belongs.

**ARKANSAS**

Ark. Rule of Evid. 505

Religious Privilege

(a) Definitions. As used in this rule:

(1) A "Clergyman" is a minister, priest, rabbi, accredited Christian Science Practitioner, or other similar functionary of a religious organization, or an individual reasonably believed so to be by the person consulting him.

(2) A communication is "confidential" if made privately and not intended for further disclosure except to other persons present in furtherance of the purpose of the communication.

(b) General Rule of Privilege. A person has a privilege to refuse to disclose and to prevent another from disclosing a confidential communication by the person to a clergyman in his professional character as spiritual adviser.

(c) Who May Claim the Privilege. The privilege may be claimed by the person, by his guardian or conservator, or by his personal representative if he is deceased. The person who was the clergyman at the time of the communication is presumed to have authority to claim the privilege but only on behalf of the communicant.

## **CALIFORNIA**

Calif. Evidence Code Sec. 1033 and 1034, 1030 through 1032, 917, 912

### **Privilege of Penitent (Sec. 1033)**

Subject to Section 912, a penitent, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a penitential communication if he claims the privilege.

### **Privilege of Clergyman (Sec. 1034)**

Subject to Section 912, a clergyman, whether or not a party, has a privilege to refuse to disclose a penitential communication if he claims the privilege.

### **"Clergyman" (Sec. 1030)**

As used in this article, "clergyman" means a priest, minister, religious practitioner, or similar functionary of a church or of a religious denomination or religious organization.

### **"Penitent" (Sec. 1031)**

As used in this article, "penitent" means a person who has made a penitential communication to a clergyman.

### **"Penitential Communication" (Sec. 1032)**

As used in this article, "penitential communication" means a communication made in confidence, in the presence of no third person so far as the penitent is aware, to a clergyman who, in the course of the discipline or practice of his church, denomination, or organization, is authorized or accustomed to hear such communications and, under the discipline or tenets of his church, denomination, or organization, has a duty to keep such communications secret.

### **Presumption That Certain Communications Are Confidential (Sec. 917)**

Whenever a privilege is claimed on the ground that the matter sought to be disclosed is a communication made in confidence in the course of the lawyer-client, physician-patient, psychotherapist-patient, clergyman-penitent, or husband-wife relationship, the communication is presumed to have been made in confidence and the opponent of the claim of privilege has the burden of proof to establish that the communication was not confidential.

### **Waiver or privilege (Sec. 912)**

(a) Except as otherwise provided in this section, the right of any person to claim a privilege provided by Section 954 (lawyer-client privilege), 980 (privilege for confidential marital communications), 994 (physician-patient privilege), 1014 (psychotherapist-patient privilege), 1033 (privilege of penitent), or 1034 (privilege of clergyman) is waived with respect to a communication protected by such privilege if any holder of the privilege, without coercion, has disclosed a significant part of the communication or has consented to such disclosure made by anyone. Consent to disclosure is manifested by any statement or other conduct of the holder of the privilege indicating his consent to the disclosure, including his failure to claim the privilege in any proceeding in which he has the legal standing and opportunity to claim the privilege.

(b) Where two or more persons are joint holders of a privilege provided by Section 954 (lawyer-client privilege), 994 (physician-patient privilege), or 1014 (psychotherapist-patient privilege), a waiver of the right of a particular joint holder of the privilege to claim the privilege does not affect the right of another joint holder to claim the privilege. In the case of the privilege provided by section 980 (privilege for confidential marital communications), a waiver of the right of one spouse to claim the privilege does not affect the right of the other spouse to claim the privilege.

(c) A disclosure that is itself privileged is not a waiver of any privilege.

(d) A disclosure in confidence of a communication that is protected by a privilege provided by Section 954 (lawyer-client privilege), 994 (physician-patient privilege), or 1014 (psychotherapist-patient privilege), when such disclosure is reasonably necessary for the accomplishment of the purpose for which the lawyer, physician, or psychotherapist was consulted, is not a waiver of the privilege.

## **COLORADO**

Colo. Rev. Stat. Sec. 1. 1&90-107

### **Who May Not Testify Without Consent**

(1) (c) A clergyman, minister, priest, or rabbi shall not be examined without both his consent and also the consent of the person making the confidential communication as to any confidential communication made to him in his professional capacity in the course of discipline expected by the religious body to which he belongs.

## **CONNECTICUT**

Conn. Gen. Stat. Sec. 52-146b

### **Privileged Communications Made to Clergyman**

A clergyman, priest, minister, rabbi or practitioner of any religious denomination accredited by the religious body to which he belongs who is settled in the work of the ministry shall not disclose confidential communications made to him in his professional capacity in any civil or criminal case or proceedings preliminary thereto, or in any legislative or administrative proceeding, unless the person making the confidential communication waives such privilege herein provided.

## **DELAWARE**

De. Code Ann. Tit. 10, Sec. 4316

### **Prohibition of examination of minister of Religion.**

No priest, clergyman, rabbi, practitioner of Christian Science, or other duly licensed, ordained or consecrated minister of any religion shall be examined in any civil or criminal proceedings in the courts of this State:

- (1) With respect to any confession, or communication, made to him, in his professional capacity in the course of discipline enjoined by the church or other religious body to which he belongs, without the consent of the person making such confession or communication;
- (2) With respect to any communication made to him, in his professional capacity in the course of giving religious or spiritual advice, without the consent of the person seeking such advice; or
- (3) With respect to any communication made to him, in his professional capacity, by either spouse, in connection with any effort to reconcile estranged spouses, without the consent of the spouse making the communication.

## **DISTRICT OF COLUMBIA**

D.C. Code Sec. 14-309

### **Clergy.**

A priest, clergyman, rabbi, or other duly licensed, ordained, or consecrated minister of a religion authorized to perform a marriage ceremony in the District of Columbia or duly accredited practitioner of Christian Science may not be examined in any civil or criminal proceedings in the Federal courts in the District of Columbia and District of Columbia courts with respect to any:

- (1) confession, or communication, made to him, in his professional capacity in the course of discipline enjoined by the church or other religious body to which he belongs, without the consent of the person making the confession or communication; or
- (2) communication made to him, in his professional capacity in the course of giving religious or spiritual advice, without the consent of the person seeking the advice; or
- (3) communication made to him, in his professional capacity, by either spouse, in connection with an effort to reconcile estranged spouses, without the consent of the spouse making the communication.

## **FLORIDA**

Fla. Stat. Sec. 90.505

### **Privilege with Respect to Communications to Clergymen**

- (1) For the purposes of this section:

(a) A "clergyman" is a priest, rabbi, practitioner of Christian Science, or minister of any religious organization or denomination usually referred to as a church, or an individual reasonably believed to be by the person consulting him.

(b) A communication between a clergyman and a person is "confidential" if made privately for the purpose of seeking spiritual counsel and advice from the clergyman in the usual course of his practice or discipline and not intended for further disclosure except to other persons present in furtherance of the communication.

(2) A person has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication by the person to a clergyman in his capacity as spiritual advisor.

- (3) The privilege may be claimed by:

- (a) The person.
- (b) The guardian or conservator of a person.
- (c) The personal representative of a deceased person.
- (d) The clergyman, on behalf of the person. The clergyman's authority to do so is presumed in the absence of evidence to the contrary.

## **GEORGIA**

Ga. Code Ann. Sec. 38-419.1

### **Communications to Ministers, Priests and Rabbis.**

Every communication made by any person professing religious faith, or seeking spiritual comfort, to any Protestant minister of the Gospel, or to any priest of the Roman Catholic faith, or to any priest of the Greek Orthodox Catholic faith, or to any Jewish rabbi, or to any Christian or Jewish minister, by whatever name called, shall be deemed privileged. No such minister, priest or rabbi shall disclose any communications made to him by any such person professing religious faith, or seeking spiritual guidance, or be competent or compellable to testify with reference to any such communication in any court.

## **HAWAII**

Hawaii Rule of Evidence 506

### **Communications to Clergymen**

(a) Definitions. As used in this rule:

(1) A "clergyman" is a minister, priest, rabbi, Christian Science practitioner, or other similar functionary of a religious organization, or an individual reasonably believed so to be by the person consulting him.

(2) A communication is "confidential" if made privately and not intended for further disclosure except to other persons present in furtherance of the purpose of the communication.

(b) General rule of privilege. A person has a privilege to refuse to disclose and to prevent another from disclosing a confidential communication by the person to a clergyman in his professional character as spiritual advisor.

(c) Who may claim the privilege. The privilege may be claimed by the person, by his guardian or conservator, or by his personal representative if he is deceased. The clergyman may claim the privilege on behalf of the person. His authority so to do is presumed in the absence of evidence to the contrary.

## **IDAHO**

Idaho Code Sec. 9-203

### **Confidential Relations and Communications**

There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate; therefore, a person cannot be examined as a witness in the following cases:

(1) A clergyman or priest cannot, without the consent of the person making the confession, be examined as to any confession made to him in his professional character in the course of discipline enjoined by the church to which he belongs.

## **ILLINOIS**

Ill. Code of Civil Procedure §8-803

### **Clergy**

A clergyman or practitioner of any religious denomination accredited by the religious body to which he or she belongs, shall not be compelled to disclose in any court, or to any administrative board or agency, or to any public officer, a confession or admission made to him or her in his or her professional character or as a spiritual advisor in the course of the discipline enjoined by the rules or practices of such religious body or of the religions which he or she professes, nor be compelled to divulge any information which has been obtained by him or her in such professional character or as such spiritual advisor.

## **INDIANA**

Ind. Code Sec. 34-1-14-5

### **Incompetency as Witnesses**

The following persons shall not be competent witnesses:

Fifth. Clergymen, as to confessions or admissions made to them in course of discipline enjoined by their respective churches.

## **IOWA**

Iowa Code Sec. 622.10

### **Communication in Professional Confidence-Exceptions; Application to Court**

No practicing attorney, counselor, physician, surgeon, or the stenographer or confidential clerk of any such person, who obtains such information by reason of his employment, minister of the gospel or priest of any denomination shall be allowed, in giving testimony, to disclose any confidential communication properly entrusted to him in his professional capacity, and necessary and proper to enable him to discharge the functions of his office according to the usual course of practice or discipline. Such prohibition shall not apply to cases where the person in whose favor the same is made waives the rights conferred.

## **KANSAS**

Kans. Stat. Ann Sec. 60429

### **Penitential Communication Privilege**

(a) Definitions. As used in this section,

(1) the term "duly ordained minister of religion" means a person who has been ordained, in accordance with the ceremonial ritual, or discipline of a church, religious sect, or organization established on the basis of a community of faith and belief, doctrines and practices of a religious character, to preach and to teach the doctrines of such church, sect, or organization and to administer the rites and ceremonies thereof in public worship, and who as his or her regular and customary vocation preaches and teaches the principles of religion and administers the ordinances of public worship as embodied in the creed or principles of such church, sect, or organization;

(2) the term "regular minister of religion" means one who as his or her customary vocation preaches and teaches the principles of religion of a church, a religious sect, or organization of which he or she is a member, without having been formally ordained as a minister of religion, and who is recognized by such church, sect, or organization as a regular minister;

(3) the term "regular or duly ordained minister of religion" does not include a person who irregularly or incidentally preaches and teaches the principles of religion of a church, religious sect, or organization and does not include any person who may have been duly ordained a minister in accordance with the ceremonial, rite, or discipline of a church, religious sect or organization, but who does not regularly, as a vocation, teach and preach the principles of religion and administer the ordinances of public worship as embodied in the creed or principles of his or her church, sect, or organization;

(4) "penitent" means a person who recognizes the existence and the authority of God and who seeks or receives from a regular or duly ordained minister of religion advice or assistance in determining or discharging his or her moral obligations, or in obtaining God's mercy or forgiveness for past culpable conduct;

(5) "penitential communication" means any communication between a penitent and a regular or duly ordained minister of religion which the penitent intends shall be kept secret and confidential and which pertains to advice or assistance in determining or discharging the penitent's moral obligations, or to obtaining God's mercy or forgiveness for past culpable conduct.

(b) Privilege. A person, whether or not a party, has a privilege to refuse to disclose, and to prevent a witness from disclosing a communication if he or she claims the privilege and the judge finds that:

(1) the communication was a penitential communication and

(2) the witness is the penitent or the minister, and

(3) the claimant is the penitent, or the minister making the claim on behalf of an absent penitent.



**KENTUCKY**

Ky. Rev. Stat. Sec. 421.210

**Competency of Certain Testimony**

(4) No attorney shall testify concerning a communication made to him, in his professional character, by his client, or his advice thereon, without the client's consent, nor shall an ordained minister, priest, rabbi or accredited practitioner of an established church or religious organization be required to testify in any civil or criminal case or proceedings preliminary thereto, or in any administrative proceeding, concerning any information confidentially communicated to him in his professional capacity under such circumstances that to disclose the information would violate a sacred or moral trust, unless the person making the confidential communication waives such privilege herein provided.

**LOUISIANA**

La. Rev. Stat. Ann. Sec. 15:477 and 478

**Privileged Communications to clergyman (Sec. 477)**

No clergyman is permitted, without the consent of the person making the communication, to disclose any communication made to him in confidence by one seeking his spiritual advice or consolation, or any information that he may have gotten by reason of such communication.

**Right to Exclude Testimony:****Nature of Privilege; Waiver (Sec. 478)**

The right to exclude the testimony, as provided in the three articles last preceding, is purely personal, and can be set up only by the person in whose favor the right exists. If the right is waived, the legal advisor, the physician and the clergyman, as the case may be, may be examined and cross-examined to the same extent as any other witness.

**MAINE**

Maine Rule of Evid. 505

**Religious Privilege****(a) Definitions. As used in this rule:**

(1) A "clergyman" is a minister, priest, rabbi, accredited Christian Science practitioner, or other similar functionary of a religious organization, or an individual reasonably believed so to be by the person consulting him.

(2) A communication is "confidential" if made privately and not intended for further disclosure except to other persons present in furtherance of the purpose of the communication.

(b) General Rule of Privilege. A person has a privilege to refuse to disclose and to prevent another from disclosing a confidential communication by the person to a clergyman in his professional character as spiritual advisor.

(c) Who May Claim the Privilege. The privilege may be claimed by the person, by his guardian or conservator, or by his personal representative if he is deceased. The person who was the clergyman at the time of the communication is presumed to have the authority to claim the privilege but only on behalf of the communicant.

**MARYLAND**

Md. Cts. & Jud. Proc. Code Ann. Sec. 9-111

**Minister, Clergyman, or Priest**

A minister of the gospel, clergyman, or priest of an established church of any denomination may not be compelled to testify on any matter in relation to any confession or communication made to him in confidence by a person seeking his spiritual advice or consolation.

**MASSACHUSETTS**

Mass. Ann. Laws Ch. 233, Sec. 20A

**Certain Communications to Priests, Rabbis, Ministers and Christian Science Practitioners Shall Be Privileged.**

A priest, rabbi or ordained or licensed minister of any church or an accredited Christian Science practitioner shall not, without the consent of the persons making the confession, be allowed to disclose a confession made to him in his professional character, in the course of discipline enjoined by the rules or practice of the religious body to which he belongs; nor shall a priest, rabbi or ordained or licensed minister of any church or an accredited Christian Science practitioner testify as to any communication made to him by any person in seeking religious or spiritual advice or comfort, or as to his advice given thereon in the course of his professional duties or in his professional character, without the consent of such person.

**MICHIGAN**

Mich. Comp. Laws Sec. 600.2156, 767.5a

**Minister, Priest, Christian Science Practitioner Not to Disclose Confessions (600.2156)**

No minister of the gospel, or priest of any denomination whatsoever, or duly accredited Christian Science practitioner, shall be allowed to disclose any confessions made to him in his professional character, in the course of discipline enjoined by the rules or practice of such denomination. (Sec. 2156)

**Certain Communications Declared Privileged and Confidential (767.5a)**

In any inquiry authorized by this act, communications between reporters of newspapers or other publications and their informants are hereby declared to be privileged and confidential. Any communications between attorneys and their clients, between clergymen and the members of their respective churches, and between physicians and their patients are hereby declared to be privileged and confidential when such communications were necessary to enable such attorneys, clergymen, or physicians to serve as such attorney, clergyman, or physician. (Sec. 5a)

**MINNESOTA**

Minn. Stat. Sec. 595.02

**Competency of Witnesses.**

Every person of sufficient understanding, including a party, may testify in any action or proceeding, civil or criminal, in court or before any person who has authority to receive evidence, except as follows:

(3) A clergyman or other minister of any religion shall not, without the consent of the party making the confession, be allowed to disclose a confession made to him in his professional character, in the course of discipline enjoined by the rules or practice of the religious body to which he belongs; nor shall a clergyman or other minister of any religion be examined as to any communication made to him by any person seeking religious or spiritual advice, aid, or comfort or his advice given thereon in the course of his professional character, without the consent of such person.

**MISSISSIPPI**

Miss. Code Ann. Sec. 13-1-22

**Confidentiality of Priest-Penitent Communications**

(1) As used in this section:

(a) A "clergyman" is a minister, priest, rabbi, or other similar functionary of a church, religious organization, or religious denomination.

(b) A communication is "confidential" if made privately and not intended for further disclosure except in furtherance of the purpose of the communication.

(2) A person has a privilege to refuse to disclose and to prevent another from disclosing a confidential communication by the person to a clergyman in his professional character as spiritual advisor.

(3) The privilege may be claimed by the person, by his guardian or conservator, or by his personal representative if he is deceased. The clergyman shall claim the privilege on behalf of the person unless the privilege is waived.

(4) A clergyman's secretary, stenographer or clerk shall not be examined without the consent of the clergyman concerning any fact, the knowledge of which was acquired in such capacity.

**MISSOURI**

Mo. Rev. Stat. Sec. 491.060

**Persons Incompetent to Testify**

The following persons shall be incompetent to testify:

(4) Any person practicing as a minister of the gospel, priest, rabbi or other person serving in a similar capacity for any organized religion, concerning a communication made to him in his professional capacity for the purpose of obtaining spiritual counseling, or absolution in accordance with a religious requirement. Any minister of the gospel, priest or rabbi, concerning a communication made to him in his professional capacity as a spiritual advisor, confessor, counselor or comforter.

**MONTANA**

Mont. Code Ann. Sec. 26-1-801, 26-1-804

**Policy to Protect Confidentiality in Certain Relations (Sec. 26-1-801)**

There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate; therefore, a person cannot be examined as a witness in the cases enumerated in this part.

**Confessions Made to Member of Clergy (Sec. 26-1-804)**

A clergyman or priest cannot, without the consent of the person making the confession, be examined as to any confession made to him in his professional character in the course of discipline enjoined by the church to which he belongs.

**NEBRASKA**

Neb. Rev. Stat. Sec. 27-506, rule 506

**General Rule of Privilege, Who May Claim Privilege**

(1) As used in this rule:

(a) A clergyman is a minister, priest, rabbi, or other similar functionary of a religious organization, or an individual reasonably believed so to be by the person consulting him; and

(b) A communication is confidential if made privately and not intended for further disclosure except to other persons present in furtherance of the purpose of the communication.

(2) A person has a privilege to refuse to disclose and to prevent another from disclosing a confidential communication by the person to a clergyman in his professional character as spiritual advisor.

(3) The privilege may be claimed by the person, by his guardian or conservator, or by his personal representative if he is deceased. The clergyman may claim the privilege on behalf of the person. His authority so to do is presumed in the absence of evidence to the contrary.

**NEVADA**

Nev. Rev. Stat. Sec. 49.255

**Confessor and Confessant Privilege**

A clergyman or priest shall not, without the consent of the person making the confession, be examined as a witness as to any confession made to him in his professional character.

**NEW HAMPSHIRE**

N.H. Rev. Stat. Ann. Sec. 516:35, 330-B:15

Tiemann's Note: New Hampshire is the first state to enact licensing legislation for pastoral counselors with special training as such, and, accordingly, there is one privilege provision for clergy in general and another for licensed pastoral counselors.

**Privileged Communications (Sec. 516:35)**

Religious Leaders. A priest, rabbi or ordained or licensed minister of any church or a duly accredited Christian Science practitioner shall not be required to disclose a confession or confidence made to him in his professional character as spiritual advisor, unless the person confessing or confiding waives the privilege.

**Privileged Communications (Sec. 330-B:15)**

The confidential relations and communications between a pastoral counselor licensed under this chapter and his client are placed on the same basis as those provided by law between attorney and client, and nothing in this chapter shall be construed to require any such privileged communications to be disclosed.

**NEW JERSEY**

NJ. Stat. Ann. Sec. 2A-8, 4A-23 (Rule of Evid. 29)

**Priest-Penitent Privilege**

Subject to Rule 37, a clergyman, minister or other person or practitioner authorized to perform similar functions, of any religion shall not be allowed or compelled to disclose a confession or other confidential communication made to him in his professional character, or as a spiritual advisor in the course of the discipline or practice of the religious body to which he belongs or of the religion which he professes, nor shall he be compelled to disclose the confidential relations and communications between and among him and individuals, couples, families or groups with respect to the exercise of his professional counseling role.

**NEW MEXICO**

N. Mex. Rule of Evid. 506

**Communications to Clergymen**

(a) Definitions. As used in this rule:

(1) A "clergyman" is a minister, priest, rabbi or other similar functionary of a religious organization, or an individual reasonably believed so to be by the person consulting him.

(2) A communication is "confidential" if made privately and not intended for further disclosure except to other persons present in furtherance of the purpose of the communication.

(b) General rule of privilege. A person has a privilege to refuse to disclose and to prevent another from disclosing a confidential communication by the person to a clergyman in his professional character as spiritual advisor.

(c) Who may claim the privilege. The privilege may be claimed by the person, by his guardian or conservator, or by his personal representative if he is deceased. The clergyman may claim the privilege on behalf of the person. His authority so to do is presumed in the absence of evidence to the contrary.

**NEW YORK**

N.Y. Civ. Prac. Law and Rules Sec. 4505

**Confidential Communication to Clergy Privileged**

Unless the person confessing or confiding waives the privilege, a clergyman, or other minister of any religion or duly accredited Christian Science practitioner, shall not be allowed to disclose a confession or confidence made to him in his professional character as spiritual advisor.

**NORTH CAROLINA**

N.C. Gen. Stat. Sec. 8-53.2

**Communications Between Clergymen and Communicants**

No priest, rabbi, accredited Christian Science practitioner, or a clergyman or ordained minister of an established church shall be competent to testify in any action, suit or proceeding concerning any information which was communicated to him and entrusted to him in his professional capacity, and necessary to enable him to discharge the functions of his office according to the usual course of his practice or discipline, wherein such person so communicating such information about himself or another is seeking spiritual counsel and advice relative to and growing out of the information so imparted, provided, however, that this section shall not apply where communicant in open court waives the privilege conferred.

**NORTH DAKOTA**

N. Dak. Rule of Evid. 505

**Religious Privilege**

(a) Definitions. As used in this rule:

(1) A "clergyman" is a minister, priest, rabbi, accredited Christian Science practitioner, or other similar functionary of a religious organization, or an individual reasonably believed so to be by the person consulting him.

(2) A communication is "confidential" if made privately and not intended for further disclosure except to the persons present in furtherance of the purpose of the communication.

(b) General rule of privilege. A person has a privilege to refuse to disclose and to prevent another from disclosing a confidential communication by the person to a clergyman in his professional character as spiritual advisor.

(c) Who may claim the privilege. The privilege may be claimed by the person, by his guardian or conservator, or by his personal representative if he is deceased. The person who was the clergyman at the time of the communication is presumed to have authority to claim the privilege but only on behalf of the communicant.

## **OHIO**

Ohio Rev. Code Ann. Sec. 2317.02 and 2921-22

### **Privileged Communications and Acts (Sec. 2317.02)**

The following persons shall not testify in certain respects:

(C) A clergyman, rabbi, priest, or regularly ordained, accredited, or licensed minister of an established and legally recognizable church, denomination, or sect, when the clergyman, rabbi, priest, or such minister remains accountable to the authority of that church, denomination or sect concerning a confession made, or any information confidentially communicated, to him for a religious counseling purpose in his professional character; however, the clergyman, rabbi, priest, or minister may testify by express consent of the person making the communication, except when the disclosure of the information is in violation of his sacred trust.

### **Failure to Report a Crime or Knowledge of a Death (Sec. 2921.22)**

(A) No person, knowing that a felony has been or is being committed, shall knowingly fail to report such information to law enforcement authorities....

(E) Division (A) or (D) of this section does not require disclosure of information, when any of the following applies:

(4) Disclosure of the information would amount to disclosure by an ordained clergyman of an organized religious body or confidential communication made to him in his capacity as such by a person seeking his aid or counsel.

(F) No disclosure of information pursuant to this section gives rise to any liability or recrimination for a breach of privilege or confidence.

## **OKLAHOMA**

Okla. Stat. Ann. Tit. 12, Sec. 385 and 2505 (Rule of Evid.)

### **Persons Incompetent to Testify Enumerated (Sec. 385)**

The following persons shall be incompetent to testify:

5. A clergyman or priest, concerning any confession made to him in his professional character in the course of discipline enjoined by the church to which he belongs, without the consent of the person making the confession.

6. A physician or surgeon concerning any communication made to him by his patient with reference to any physical or supposed physical disease, or any knowledge obtained by a personal examination of any such patient; Provided, that if a person offers himself as a witness, that is to be deemed a consent to the examination; also, if an attorney, clergyman or priest, physician or surgeon on the same subject, within the meaning of the last three subdivisions of this Section.

### **Religious Privilege (Sec. 2505)**

A. As used in this section:

1. A "clergyman" is a minister, priest, rabbi, accredited Christian Science practitioner or other similar functionary of a religious organization, or any individual reasonably believed to be a clergyman by the person consulting him; and

2. A communication is "confidential" if made privately and not intended for further disclosure except to other persons present in furtherance of the purpose of the communication.

B. A person has a privilege to refuse to disclose and to prevent another from disclosing his confidential communication made to a clergyman acting in his professional capacity.

C. The privilege may be claimed by the person, by his guardian or conservator, or by his personal representative if he is deceased. The clergyman is presumed to have authority to claim the privilege but only on behalf of the communicant.

## **OREGON**

Oreg. Evid. Code Sec. 40.260, Rule 506; Sec. 40.265, Rule 508a

### **Clergy-Penitent Privilege (Sec. 40.260, Rule 506)**

(1) As used in this section, unless the context requires otherwise:

(a) "Confidential communication" means a communication made privately and not intended for further disclosure except to other persons present in furtherance of the purpose of the communication.

(b) "Member of the clergy" means a minister of any church, religious denomination or organization or accredited Christian Science practitioner who in the course of the discipline or practice of that church, denomination or organization is authorized or accustomed to hearing confidential communications and, under the discipline or tenets of that church, denomination or organization, has a duty to keep such communications secret.

(2) A member of the clergy shall not, without the consent of the person making the communication, be examined as to any confidential communication made to the member of the clergy in the member's professional character.

**PENNSYLVANIA**

Pa. Cons. Stat. Ann. Sec. 5943

**Confidential Communications to Clergymen**

No clergyman, priest, rabbi or minister of the gospel of any regularly established church or religious organization, except clergymen or ministers, who are self-ordained or who are members of religious organizations in which members other than the leader thereof are deemed clergymen or ministers, who while in the course of his duties has acquired information from any person secretly and in confidence shall be compelled, or allowed without consent of such person, to disclose that information in any legal proceeding, trial or investigation before any government unit.

**PUERTO RICO**

P.R. Laws Ann. Tit. 32, Sec. 1734

**Privileged Matters**

A person cannot be examined as a witness in the following cases:

(3) A clergyman or priest cannot, without the consent of the person making the confession, be examined as to any confession made to him in his professional character in the course of discipline by the church to which he belongs; nor as to any information obtained by him from a person about to make such confession and received in the course of preparation for such confession.

**RHODE ISLAND**

R.I. Gen. Laws Sec. 9-17-23

**Privileged Communications to Clergymen**

In the trial of every cause, both civil and criminal, no clergyman or priest shall be competent to testify concerning any confession made to him in his professional character in the course of discipline enjoined by the church to which he belongs, without the consent of the person making the confession. No duly ordained minister of the gospel, priest or rabbi of any denomination shall be allowed in giving testimony to disclose any confidential communication, properly entrusted to him in his professional capacity, and necessary and proper to enable him to discharge the functions of his office in the usual course of practice or discipline, without the consent of the person making such communication.

**SOUTH CAROLINA**

S.C. Code Sec. 19-11-90

**Priest-Penitent Privilege**

In any legal or quasi-legal trial, hearing or proceeding before any court, commission or committee no regular or duly ordained minister, priest or rabbi shall be required in giving testimony, to disclose any confidential communication properly entrusted to him in his professional capacity and necessary and proper to enable him to discharge the functions of his office according to the usual course of practice or discipline of his church or religious body. This prohibition shall not apply to cases where the party in whose favor it is made waives the rights conferred.

**SOUTH DAKOTA**

S. Dak. Codified Laws Sec. 19-13-16 to 18

**Religious Privilege - Definition of Terms**

As used in Sec. 19-13-16 to 19-13-18, inclusive:

(1) A "clergyman" is a minister, priest, rabbi, accredited Christian Science practitioner, or other similar functionary of a religious organization, or an individual reasonably believed so to be by the person consulting him.

(2) A communication is "confidential" if made privately and not intended for further disclosure except to other persons present in furtherance of the purpose of the communication.

**Privilege on Communications to Clergyman (19-13-17. Rule 505b)**

A person has a privilege to refuse to disclose and to prevent another from disclosing a confidential communication by the person to a clergyman in his professional character as spiritual advisor.

**Persons Entitled to Claim Religious Privilege (19-13-18. Rule 505c)**

The privilege described by Sec. 19-13-17 may be claimed by the person, by his guardian or conservator, or by his personal representative if he is deceased. The person who was the clergyman at the time of the communication is presumed to have authority to claim the privilege but only on behalf of the communicant.

## **TENNESSEE**

Tenn. Code Ann. Sec. 24-1-203

### **Clergyman-Communications Confidential--Waiver-Penalty**

(a)

(1) No minister of the gospel, no priest of the Catholic Church, no rector of the Episcopal Church, no ordained rabbi, and no regular minister of religion of any religious organization or denomination usually referred to as a church, over the age of eighteen (18) years, shall be allowed or required in giving testimony as a witness in any litigation, to disclose any information communicated to him in a confidential manner, properly entrusted to him in his professional capacity, and necessary to enable him to discharge the functions of his office according to the usual course of his practice or discipline, wherein such person so communicating such information about himself or another is seeking spiritual counsel and advice relative to and growing out of the information so imparted.

(2) It shall be the duty of the judge of the court wherein such litigation is pending, when such testimony as prohibited in this section is offered, to determine whether or not that person possesses the qualifications which prohibit him from testifying to the communications sought to be proven by him.

(b) The prohibition of this section shall not apply to cases where the communicating party, or parties, waives the right so conferred by personal appearance in open court so declaring, or by an affidavit properly sworn to by such a one or ones, before some person authorized to administer oaths, and filed with the court wherein litigation is pending.

(c) Nothing in this section shall modify or in any wise change the law relative to "hearsay testimony."

(d) Any minister of the gospel, priest of the Catholic Church, rector of the Episcopal Church, ordained rabbi, and any regular minister of religion of any religious organization or denomination usually referred to as a church, violating the provisions of this section, shall be guilty of a misdemeanor and fined not less than fifty dollars (\$50.00) and imprisoned in the county jail or workhouse not exceeding six (6) months.

## **TEXAS**

Tex. Rule of Evid. 505

### **Communications to Clergymen**

(a) Definitions. As used in this rule:

(1) A "clergyman" is a minister, priest, rabbi, accredited Christian Science Practitioner, or other similar functionary of a religious organization or an individual reasonably believed so to be by the person consulting him.

(2) A communication is "confidential" if made privately and not intended for further disclosure except to other persons present in furtherance of the purpose of the communication.

(b) General rule of privilege. A person has a privilege to refuse to disclose and to prevent another from disclosing a confidential communication by the person to a clergyman in his professional character as spiritual adviser.

(c) Who may claim the privilege. The privilege may be claimed by the person, by his guardian or conservator, or by his personal representative if he is deceased. The person who was the clergyman at the time of the communication is presumed to have authority to claim the privilege but only on behalf of the communicant.

## **UTAH**

Utah Code Ann. Sec. 78-24-8, Rule of Evid. 29

### **Privileged Communications (Sec. 78-24-8)**

There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate. Therefore, a person cannot be examined as a witness in the following cases:

(3) A clergyman or priest cannot, without the consent of the person making the confession, be examined as to any confession made to him in his professional character in the course of discipline enjoined by the church to which he belongs.

### **Priest-Penitent privilege--Definitions**

#### **Penitential Communications (Rule 29)**

(1) As used in this rule:

(a) "priest" means a priest, clergyman, minister of the gospel or other officer of a church or of a religious denomination or organization, who in the course of its discipline or practice is authorized or accustomed to hear, and has a duty to keep secret, penitential communications made by members of his church, denomination or organization;

(b) "penitent" means a member of a church or religious denomination or organization who has made a penitential communication to a priest thereof;

(c) "penitential communication" means a confession of culpable conduct made secretly and in confidence by a penitent to a priest in the course of discipline or practice of the church or religious denomination or organization of which the penitent is a member.

(2) A person, whether or not a party, has a privilege to refuse to disclose, and to prevent a witness from disclosing a communication if he claims the privilege and the judge finds that:

(a) The communication was a penitential communication.

(b) The claimant is the penitent, or the priest making the claim on behalf of an absent penitent.

## **VERMONT**

VT Stat. Ann. Tit. 12, Sec. 1607

### **Priests and Ministers**

A priest or minister of the gospel shall not be permitted to testify in court to statements made to him by a person under the sanctity of a religious confessional.

## **VIRGIN ISLANDS**

V.I. Code Ann. Tit. 5, Sec. 857

### **Priest-Penitent Privilege;**

#### **Definition; Penitential Communications**

(1) As used in this section:

(a) "priest" means a priest, clergyman, minister of the gospel or other officer of a church or of a religious denomination or organization, who in the course of its discipline or practice is authorized or accustomed to hear, and has a duty to keep secret, penitential communications made by members of his church, denomination or organization;

(b) "penitent" means a member of a church or religious denomination or organization who has made a penitential communication to a priest thereof;

(c) "penitential communication" means a confession of culpable conduct made secretly and in confidence by a penitent to a priest in the course of discipline or practice of the church or religious denomination or organization of which the penitent is a member.

(2) A person, whether or not a party, has a privilege to refuse to disclose, and to prevent a witness from disclosing a communication if he claims the privilege and the judge finds that:

(a) the communication was a penitential communication and

(b) the witness is the penitent or the priest, and

(c) the claimant is the penitent or the priest making the claim on behalf of an absent penitent.



## **VIRGINIA**

Va. Code Sec. 8.01-400

### **Communications Between Ministers of Religion and Persons They Counsel or Advise.**

No regular minister, priest, rabbi or accredited practitioner over the age of eighteen years, of any religious organization or denomination usually referred to as a church, shall be required in giving testimony as a witness in any civil action to disclose any information communicated to him in a confidential manner, properly entrusted to him in his professional capacity and necessary to enable him to discharge the functions of his office according to the usual course of his practice or discipline, wherein such person so communicating such information about himself or another is seeking spiritual counsel and advice relative to and growing out of the information so imparted.

Va. Code Sec. 19.2-271.3

### **Communications Between Ministers of Religion and Persons They Counsel or Advise.**

No regular minister, priest, rabbi or accredited practitioner over the age of eighteen years, of any religious organization or denomination usually referred to as a church, shall be required in giving testimony as a witness in any criminal action to disclose any information communicated to him by the accused in a confidential manner, properly entrusted to him in his professional capacity and necessary to enable him to discharge the functions of his office according to the usual course of his practice or discipline, wherein such person so communicating such information about himself or another is seeking spiritual counsel and advice relative to and growing out of the information so imparted.

## **WASHINGTON**

Wash. Rev. Code Ann. Sec. 5.60.060

### **Who Are Disqualified-Privileged Communications**

(3) A member of the clergy or a priest shall not, without the consent of a person making the confession, be examined as to any confession made to him or her in his or her professional character, in the course of discipline enjoined by the church to which he or she belongs.

## **WEST VIRGINIA**

W. Va. Code Sec. 48-2-1a.

### **Communications Between Clergyman and Party**

In any action brought pursuant to the provisions of this article, no priest, minister, rabbi or other clergyman, as defined in section twelve-a [§ 48-1-12a], article one of this chapter, of any religious denomination or organization who is not a party to said action shall be compelled to testify regarding any communications or statements made to such clergyman in his capacity as spiritual counselor or spiritual adviser by a party to said action, if (a) both the clergyman and the party making such communications or statements claim that the communications or statements were made to the clergyman in his capacity as a clergyman and spiritual counselor or spiritual adviser to such party; and (b) no person, other than the clergyman, such party and the spouse of such party, was present when such communications or statements were made; and (c) the party making such communications or statements does not either consent to their disclosure or otherwise waive the privilege granted by this section: Provided, that the privilege granted by this section shall be in addition to and not in derogation of any other privileges recognized by law.

Tiemann's Note: This statute is found in the West Virginia Domestic Relations Law and applies only to clergy engaged in marital counseling.

## **WISCONSIN**

Wis. Stat. Sec. 905.06

### **Communications to Clergymen**

(1) Definitions. As used in this section:

(a) A "clergyman" is a minister, priest, rabbi, or other similar functionary of a religious organization, or an individual reasonably believed so to be by the person consulting him.

(b) A communication is "confidential" if made privately and not intended for further disclosure except to other persons present in furtherance of the purpose of the communication.

(2) General rule of privilege. A person has a privilege to refuse to disclose and to prevent another from disclosing a confidential communication by the person to a clergyman in his professional character as a spiritual advisor.

(3) Who may claim the privilege. The privilege may be claimed by the person, by his guardian or conservator, or by his personal representative if he is deceased. The clergyman may claim the privilege on behalf of the person. Os authority so to do is presumed in the absence of evidence to the contrary.

**WYOMING**

Wyo. Stat. Ann. Sec. 1-1 2-1 01

**Privileged Communications and Acts**

(a) The following persons shall not testify in certain respects:

A clergyman or priest concerning a confession made to him in his professional character if enjoined by the church to which he belongs.

**APPENDIX 2**  
**State Statutes on Child Abuse Reporting**  
(Copied From Bush and Tiemann, The Right to Silence, pages 249-256)

**Definition of Terms**

*Permissive:* The person can disclose without liability.

*Mandatory:* The person is required to disclose.

*Privileges abrogated:* The privilege from testifying against the client no longer exists.

**ALABAMA**

Ala. Code Sec. 26-14-1 through 26-14-13

*Permissive:* Any person with reasonable cause to suspect abuse or neglect.

*Privileges abrogated:* All except attorney-client.

**ALASKA**

Alaska Stat. Sec. 47.17.010 through 47.17.070

*Permissive:* Does not prohibit any person from reporting who has cause to believe abuse or neglect has occurred.

*Privileges abrogated:* Physician-patient and husband-wife, specifically; however, privilege is not grounds for excluding evidence regarding harm to a child.

**ARIZONA**

Ariz. Rev. Stat. Ann. Sec. 13-3620 and 13-3623

*Mandatory:* Any person having responsibility for the care of a child.

*Permissive:* Not specified.

*Privileges abrogated:* All except attorney-client.

**ARKANSAS**

Ark. Stat. Ann. Sec. 42-807 through 42-819

*Permissive:* Any person with reasonable cause to believe abuse has occurred.

*Privileges abrogated:* All except attorney-client.

**CALIFORNIA**

Calif. Penal Code Sec. 11165 through 11174.5

*Permissive:* Any person who has knowledge of or who observes a child whom he or she knows or reasonably suspects has been a victim of abuse.

*Privileges abrogated:* Physician-patient and psychotherapist-patient.

**COLORADO**

Colo. Rev. Stat. Sec. 19-10-101 through 19-10-117

*Mandatory:* Christian Science practitioners.

*Permissive:* Any person may report.

*Privileges abrogated:* Patient-physician, patient-registered professional nurse, and husband-wife.

**CONNECTICUT**

Conn. Gen. Stat. Ann. Sec. 17-38a through 17-38f, and 46b-120

*Mandatory:* Any person with reasonable cause to suspect abuse has occurred or will occur.

*Privileges abrogated:* Husband-wife.

**DELAWARE**

Dela. Code Ann. Tit. 16, Sec. 901 through 909

*Mandatory:* Any person.

*Privileges abrogated:* All except attorney-client.

**DISTRICT OF COLUMBIA**

D.C. Code Ann. Sec. 2-1351 through 2-1357 and 6-2101 through 6-2107

*Permissive:* Any person.

*Privileges abrogated:* Husband-wife and physician-patient.

**FLORIDA**

Fla. Stat. Ann. Sec. 827.01 through 827.07 and 415.501 through 415.514

*Mandatory:* Any person who knows or has reasonable cause to suspect that a child is being abused or neglected.

*Privileges abrogated:* All except attorney-client and clergy-penitent.

**GEORGIA**

Ga. Code Ann. Sec. 19-7-5

*Permissive:* Any person having reasonable cause to believe that a child has had physical injuries inflicted upon him by other than by accidental means or has been neglected, exploited, or sexually assaulted.

*Privileges abrogated:* Not specified.

**HAWAII**

Hawaii Rev. Stat. Sec. 350-1 through 350-7

*Permissive:* Any person if he or she has reason to believe a minor has been abused or neglected or is threatened with abuse or neglect.

*Privileges abrogated:* Doctor-patient and husband-wife.

**IDAHO**

Idaho Code Sec. 16.1601 through 16.1625

*Mandatory:* Any person who has reasonable cause to believe or who observes the child being subjected to conditions or circumstances which would reasonably result in abuse, abandonment, or neglect.

*Privileges abrogated:* All except attorney-client. Specifically names ministers and counselors among those whose privileges are abrogated.

**ILLINOIS**

Ill. Ann. Stat. chap. 23, Sec. 2051 through 2061.7

*Mandatory:* Christian Science practitioners.

*Permissive:* Any person who has reasonable cause to believe a child may be abused or neglected.

*Privileges abrogated:* Only those affecting professional persons who are required to report.

**INDIANA**

Ind. Code Ann. Sec. 31-6-1 1-1 through 31-6-11-22

*Mandatory:* Any staff member of a public or private institution, and any individual.

*Privileges abrogated:* Husband-wife and medical practitioner-patient.

**IOWA**

Iowa Code Ann. Sec. 232.67 through 232.77

*Permissive:* Any person who believes that a child has been abused.

*Privileges abrogated:* Husband-wife and health practitioner-patient.

**KANSAS**

Kans. Stat. Ann. Sec. 38-1521 through 38-1529

*Mandatory:* Christian Science practitioners.

*Permissive:* Any person who has reason to suspect that a child has been injured as a result of physical, mental, or emotional abuse, neglect or sexual abuse.

*Privileges abrogated:* Physician-patient, psychologist-client, and social worker-client.

**KENTUCKY**

Ky. Rev. Stat. Ann. Sec. 199.011 through 199.335

*Mandatory:* Any person, organization, or agency.

*Privileges abrogated:* All except attorney-client and clergy-penitent.

**LOUISIANA**

La. Civil Code Ann. art. 14.403

*Mandatory:* Any person or agency having responsibility for the care of children.

*Permissive:* Any person having cause to believe that a child's physical or mental health or welfare has been or may be further adversely affected by abuse or neglect.

*Privileges abrogated:* All except attorney-client. Clergy privilege mentioned specifically as abrogated.

**MAINE**

Maine Rev. Stat. Ann. Tit. 22, Sec. 4001 through 4023

*Mandatory:* Christian Science practitioners.

*Privileges abrogated:* Husband-wife and physician or psychotherapist-patient.

**MARYLAND**

Md. Family Law Code Ann. Sec. 5-901 through 5-911 and art. 27, Sec. 35a

*Mandatory:* Any person who has reason to believe a child has been subjected to abuse.

*Privileges abrogated:* Any privilege attached to any person required to report is abrogated.

**MASSACHUSETTS**

Mass. Gen. Laws Ann. ch. 119, Sec. 5 1A through 51F

*Mandatory:* Family counselors.

*Permissive:* Any person who has reasonable cause to believe that a child is suffering or has died as a result of abuse or neglect, including malnutrition, or who is determined to be physically dependent on an addictive drug at birth.

*Privileges abrogated:* Social worker-client and psychotherapist-client.

**MICHIGAN**

Mich. Comp. Laws Ann. Sec. 722.621 through 722-6.34k

*Permissive:* Any person who has reasonable cause to suspect child abuse or neglect.

*Privileges abrogated:* All except attorney-client.

**MINNESOTA**

Minn. Stat. Sec. 626.556

*Mandatory:* Clergy, unless they acquired knowledge from confession or from spiritual counseling.

*Privileges abrogated:* Husband-wife physician, surgeon, dentist, chiropractor, registered nurse, psychologist, or consulting psychologist and patient.

**MISSISSIPPI**

Miss. Code Ann. Sec. 43-21-353 through 43-21-357

*Mandatory:* Minister or any other person.

*Privileges abrogated:* Physician-patient.

**MISSOURI**

Mo. Ann. Stat. Sec. 210.110 through 210.166

*Mandatory:* Christian Science practitioners.

*Permissive:* Any person with reasonable cause to suspect that a child has been or may be subjected to abuse or neglect, or observation of a child being subjected to conditions or circumstances which would reasonably result in abuse or neglect.

*Privileges abrogated:* All except attorney-client.

**MONTANA**

Mont. Code Ann. Sec. 41-3-201 through 41-3-208

*Mandatory:* Christian Science Practitioners and religious healers.

*Permissive:* Any person who knows or has reasonable cause to suspect that a child is being abused or neglected.

*Privileges abrogated:* Physician-patient, and all similar privileges if the person gains knowledge of abuse as a result of treatment of the child.

**NEBRASKA**

Neb. Rev. Stat. Sec. 28-707 through 28-727, and 38-115 through 38-116

*Mandatory:* Any person having reasonable cause to believe that a child has been subjected to abuse or neglect, or who observes such a person being subjected to conditions or circumstances which would reasonably result in abuse or neglect.

*Privileges abrogated:* Physician-patient and husband-wife.

**NEVADA**

Nev. Rev. Stat. Sec. 432B.010 through 432B.400, and 200.55081

*Mandatory:* Marriage and family counselors, clergy, practitioners of Christian Science, or religious healers, unless they have acquired knowledge of the abuse or neglect from the offender during a confession.

*Permissive:* Any persons who know or have reason to believe in their professional or occupational capacities that a child has been abused or neglected.

*Privileges abrogated:* Any privileges granted under Chapter 49 are abrogated in relation to reporting requirements, cooperation with a protective service agency, and in any proceeding resulting therefrom.

**NEW HAMPSHIRE**

N. H. Rev. Stat. Ann. Sec. 169-C:1 through 169-C:40

*Mandatory:* Christian Science practitioners, priests, ministers, rabbis, and any other person having reason to suspect that a child has been abused or neglected.

*Privileges abrogated:* All except attorney-client.

**NEW JERSEY**

N. J. Stat. Ann. Sec. 9:6-1 through 9:6-8.40

*Mandatory:* Any person having reasonable cause to believe that a child has been subjected to abuse or acts of abuse.

*Privileges abrogated:* Not specified.

**NEW MEXICO**

N. Mex. Stat. Ann. Sec. 32-1-3 through 32-1-16

*Mandatory:* Any person knowing or suspecting that a child is being abused or neglected.

*Privileges abrogated:* Physician-patient or any similar privilege or rule against disclosure.

**NEW YORK**

N.Y. Social Services Law Sec. 411 through 425

*Mandatory:* Christian Science practitioners.

*Permissive:* Any person having reasonable cause to suspect that a child is being abused or maltreated.

*Privileges abrogated:* Not specified.

**NORTH CAROLINA**

N.C. Gen. Stat. Sec. 7A-542 through 7A-552

*Mandatory:* Any person or institution with cause to suspect that any juvenile is being abused or neglected.

*Privileges abrogated:* Physician-patient and husband-wife.

**NORTH DAKOTA**

N. Dak. Code Sec. 50-25.1-02 through 50-25.1-13

*Mandatory:* Religious practitioners of the healing arts.

*Permissive:* Any person having reasonable cause to suspect that a child is being abused or neglected.

*Privileges abrogated:* All except attorney-client.

**OHIO**

Ohio Rev. Code Ann. Sec. 2151.42.1

*Mandatory:* Any person rendering spiritual treatment through prayer in accordance with the tenets of a well-recognized religion, acting in his or her official or professional capacity.

*Permissive:* Anyone having reason to believe that a child less than eighteen years old or any crippled or otherwise physically or mentally handicapped child under twenty-one has suffered any injury, disability, or other condition of such nature as to reasonably indicate abuse or neglect of the child.

*Privileges abrogated:* Physician-patient.

**OKLAHOMA**

Okla. Stat. Ann. Tit. 21 Sec. 846 through 848

*Mandatory:* Health care professionals only.

*Privileges abrogated:* Physician-patient and similar privileges.

**OREGON**

Oreg. Rev. Stat. Sec. 418.740 through 418.755

*Mandatory:* Any public or private official.

*Privileges abrogated:* All except psychiatrists, psychologists, clergy, and attorneys.

**PENNSYLVANIA**

Penn. Stat. Ann. Tit. 11, Sec. 2201 through 2223

*Mandatory:* Any persons who in the course of their employment, occupation, or practice in their profession come into contact with children; Christian Science practitioners.

*Permissive:* Any person with reasonable cause to suspect that a child is being abused.

*Privileges abrogated:* All privileges are abrogated for any person required to report.

**RHODE ISLAND**

R.I. Gen. Laws Sec. 40-1 1-1 through 40-11-16

*Mandatory:* Any person.

*Privileges abrogated:* All except attorney-client.

**SOUTH CAROLINA**

S.C. Code Ann. Sec. 20-7-480 through 20-7-690

*Mandatory:* Christian Science practitioners and religious healers.

*Privileges abrogated:* All except attorney-client and priest-penitent.

**SOUTH DAKOTA**

S. Dak. Codified Laws Ann. Sec. 26-10-10 through 26-10-18, 26-8-6 and 26-8-43

*Mandatory:* Religious healing practitioners.

*Permissive:* Any person who knows, suspects, or has reason to believe that a child has received physical or emotional injury or injuries as the result of abuse or intentional neglect.

*Privileges abrogated:* Physician-patient, school counselor-student, and husband-wife.

**TENNESSEE**

Tenn. Code Ann. Sec. 37-1-401 through 37-1413; Sec. 37-1-113,-114, 116,-128, and -601 through 616

*Mandatory:* Any person.

*Privileges abrogated:* Husband-wife, psychiatrist-patient, and psychologist-patient. In cases of child sexual abuse, all privileges are abrogated except attorney-client.

**TEXAS**

Tex. Family Code Ann. Sec. 34.01 through 34.08 and 35.04

*Mandatory:* Any person.

*Privileges abrogated:* All except attorney-client.

**UTAH**

Utah Code Ann. Sec. 78-3b-I through 78-3b-1 5

*Mandatory:* Any person.

*Privileges abrogated:* Physician-patient. If a clergyman receives information about abuse or neglect from any source other than the confession of the perpetrator, he is required to report on the basis of that information even though he may also have received such information from the confession of the perpetrator.

**VERMONT**

Vt. Stat. Ann. Tit. 33, Sec. 681 through 689, and 639 through 642

*Permissive:* Any person who has reasonable cause to believe that a child has been abused or neglected.

*Privileges abrogated:* Not specified.

**VIRGINIA**

Va. Code Ann. Sec. 63-1248 through 63-1248.17

*Mandatory:* Christian Science practitioners.

*Permissive:* Any person who suspects that a child is being abused or neglected.

*Privileges abrogated:* Physician-patient and husband-wife.

**WASHINGTON**

Wash. Rev. Code Sec. 26.44.010 through 26-44.80

*Permissive:* Any person who has reasonable cause to believe that a child has suffered abuse or neglect.

*Privileges abrogated:* All except attorney-client.

**WEST VIRGINIA**

W. Va. Code Sec. 49-6A-1 through 49-6A-1 0, and 49-1-3 through 49-6-9

*Mandatory:* Christian Science Practitioners and religious healers.

*Permissive:* Any person who has reasonable cause to suspect that a child has been abused or neglected in a home or institution or who observes that child being subjected to conditions that are likely to result in abuse or neglect.

*Privileges abrogated:* All except attorney-client.



**WISCONSIN**

Wis. Stat. Ann. Sec. 48.981

*Permissive:* Any person having reason to suspect that child has been abused or neglected or reason to believe that a child has been threatened with an injury and that abuse of the child will occur.

*Privileges abrogated:* Physician-patient and husband-wife.

**WYOMING**

Wyo. Stat. Sec. 14-3-201 through 14-3-215

*Mandatory:* Any person who knows or has reasonable cause to believe or suspect that a child has been abused or neglected or who observes any child being subjected to conditions or circumstances that would reasonably result in abuse or neglect.

*Privileges abrogated:* All except attorney-client, and clergy-penitent when enjoined by church to which the clergyman belongs.

**APPENDIX 3**  
**State Statutes on Elder Abuse Reporting**  
(Copied From Bush and Tiemann, The Right to Silence, pages 247-264)

**ALABAMA**

Ala. Code Sec. 38.9.1 through 38.9.11

*Permissive:* Any person who has reasonable cause to believe abuse has occurred.

*Privileges abrogated:* Not specified.

**ALASKA**

Alaska Stat. Sec. 47.24.010 through 47-24.100

*Mandatory:* Clergy are specified among those required to report if they have cause to believe that an elderly person has suffered physical harm as a result of abuse, neglect, or abandonment, or has suffered economic harm as a result of theft, fraud, or coercion by a caretaker.

*Privileges abrogated:* Not specified.

**ARIZONA**

Ariz. Rev. Stat. Ann. Sec. 46-451 through 46-454 and 14-5310.01

*Permissive:* Any person who has a reasonable basis to believe abuse or neglect has occurred.

*Privileges abrogated:* All except clergy-penitent.

**ARKANSAS**

Ark. Stat. Ann. Sec. 59-1301 through 59-1354

*Permissive:* Any person who has reasonable cause to suspect that an endangered person aged eighteen or older has been abused or neglected.

*Privileges abrogated:* All except attorney-client.

**CALIFORNIA**

Calif. Welfare & Institutions Code Sec. 9380 through 9386

*Permissive:* Any person who has knowledge of or observes an elder aged sixty-five or older whom he or she reasonably suspects has been a victim of abuse.

*Privileges abrogated:* All.

**COLORADO**

Colo. Rev. Stat. Sec. 26.3.1.101 through 26.3.1.105

*Permissive:* Law requires no one to report. Christian Science practitioners and clergy are listed among those urged to report.

*Privileges abrogated:* Not specified.

**CONNECTICUT**

Conn. Gen. Stat. Ann. Sec. 46a-14 through 46a-25

*Mandatory:* Clergy are listed among those required to report if they have cause to suspect abuse, neglect, exploitation, or abandonment of an adult aged sixty or older.

*Privileges abrogated:* Not specified.

**DELAWARE**

Dela. Code Ann. Tit. 31 Sec. 3901 through 3911

*Mandatory:* Any person, having reasonable cause to believe that an adult person who is eighteen years old or older and who is infirm or incapacitated is an abused person, shall report.

*Privileges abrogated:* Not specified.

**FLORIDA**

Fla. Stat. Ann. Sec. 415.101 through 415.112

*Mandatory:* Any person, including but not limited to any practitioner who relies solely on spiritual means for healing, who knows or has reasonable cause to suspect that an aged or disabled person is being abused, neglected, or exploited.  
*Privileges abrogated:* All except attorney-client.

**GEORGIA**

Ga. Code Ann. Sec. 30-5-1 through 30-5-8

*Mandatory:* Clergy are listed specifically among those who are required to report knowledge that any resident or former resident of a longterm-care facility has been abused or exploited.  
*Privileges abrogated:* Not specified.

**HAWAII**

Hawaii Rev. Stat. Sec. 349C-1 through 349C-8

*Permissive:* Any person with reason to suspect abuse or neglect of a person who is at least sixty-five years of age.  
*Privileges abrogated:* All who are required to report.

**IDAHO**

Idaho Code Sec. 39-53011 through 39-5312 and 39-5201 through 39-5212

*Mandatory:* Any person having reasonable cause to believe that an elderly person aged sixty or older has been abused, abandoned, neglected, or exploited, or who observes the elderly person being subjected to conditions or circumstances which would reasonably result in abused, neglect, exploitation, or abandonment, must report or cause the situation to be reported.  
*Privileges abrogated:* Not specified.

**ILLINOIS**

Ill. Ann. Stat. ch. 23.6301 through 6310 and 23.6501 through 6510

*Permissive:* Any person may report.  
*Privileges abrogated:* Not specified.

**INDIANA**

Ind. Code Ann. Sec. 4-27-7-1 through 4-27-7-14

*Mandatory:* A person who believes or who has reason to believe that an endangered individual aged eighteen or older is the victim of battery, neglect, or exploitation must report.  
*Privileges abrogated:* All except attorney-client.

**IOWA**

Iowa Code Ann. Sec. 235-B.1 through 235-B.7

*Permissive:* Any person who believes that a dependent adult has suffered abuse may report.  
*Privileges abrogated:* Not specified.

**KANSAS**

Kansas has three separate laws which may be used to provide protection for adults. None requires clergy to report. One permits any person to report.  
*Privileges abrogated:* Not specified.

**KENTUCKY**

Ky. Rev. Stat. Ann. Sec. 209.010 through 209.150

*Mandatory:* Any person with reasonable cause to suspect that a person eighteen years old or older, because of mental or physical dysfunctioning or due to abuse or neglect inflicted by a spouse is unable to manage his or her own resources, carry out activities of daily living, or protect him or herself from neglect or hazardous or abusive situations without assistance from others, and also has no one available, willing, and responsible to assist him or her.  
*Privileges abrogated:* All.

**LOUISIANA**

La. Civil Code Ann. Art. 14.403.2 and 40

*Mandatory:* Any person having cause to believe that an adults (aged eighteen or older) physical or mental health or welfare has been or may be adversely affected by abuse or neglect by others or by self-neglect shall report.

*Permissive:* Any person having knowledge of alleged abuse or neglect of a patient of a nursing home may report.

*Privileges abrogated:* Not specified.

**MAINE**

Maine Rev. Stat. Ann. Tit. 22, Sec. 3470 through 3485

*Mandatory:* Christian Science practitioner.

*Permissive:* Any person who has reasonable cause to suspect abuse, neglect, or exploitation of a dependent or incapacitated adult aged eighteen or older or an adult suspected of incapacity.

*Privileges abrogated:* All except not required to report, if knowledge resulted from treatment of the abuser.

**MARYLAND**

Md. Ann. Code Sec. 14-201 through 14-304 and 19-347

*Mandatory:* Any person who believes that a resident of a nursing home has been abused is required to report.

*Permissive:* Any person not required to report but who has reason to believe that an alleged vulnerable adult has been subjected to abuse, neglect, self-neglect, or exploitation may report.

*Privileges abrogated:* Not specified.

**MASSACHUSETTS**

Mass. Gen. Laws Ann. cha. 19a Sec. 14 through 26

*Permissive:* Any person with reasonable cause to believe an elderly person aged sixty or older is suffering from or has died as a result of abuse may report.

*Privileges abrogated:* Not specified.

**MICHIGAN**

Mich. Compiled Laws Ann. Sec. 400.11 through 400.1 le

*Permissive:* Any person who suspects that an adult has been abused, neglected, or exploited or is endangered may report.

*Privileges abrogated:* All except attorney-client.

**MINNESOTA**

Minn. Stat. Sec. 626.557(1) through 626.557(19)

*Permissive:* Any person not named as required to report may do so.

*Privileges abrogated:* Yes, for those required to report.

**MISSISSIPPI**

Miss. Code Ann. Sec. 42-27-1 through 4M7-35

*Mandatory:* Any person having reasonable cause to believe that a vulnerable adult aged eighteen or older has been or is being abused, neglected, or exploited shall report.

*Privileges abrogated:* Not specified.

**MISSOURI**

Mo. Ann. Stat. Sec. 660.250 through 660.295

*Mandatory:* Any person having reasonable cause to suspect that an eligible adult aged sixty or older presents a likelihood of suffering serious physical harm and is in need of protective services shall report.

*Privileges abrogated:* Not specified.

**MONTANA**

Mont. Code Ann. Sec. 53-5-501 through 53-5-525

*Permissive:* Any person who knows or has reasonable cause to suspect that an older person (aged sixty or older) has been subjected to abuse, exploitation, or neglect may report.

*Privileges abrogated:* All those who are required to report, except attorneys.

**NEBRASKA**

Neb. Rev. Stat. Sec. 28-708 through 28-726

*Mandatory:* Any person who has reasonable cause to believe that a child or incompetent or disabled person has been subjected to abuse or neglect or who observes such a person being subjected to conditions or circumstances which reasonably would result in abuse or neglect, shall report or cause a report to be made.

*Privileges abrogated:* All.

**NEVADA**

Nev. Rev. Stat. Sec. 200.5091 through 200.5099

*Mandatory:* Marriage and family counselors, clergy, practitioners of Christian Science or religious healers, unless they acquired knowledge of abuse, neglect, or exploitation from the offender during a confession.

*Privileges abrogated:* All, except as noted.

**NEW HAMPSHIRE**

N. H. Rev. Stat. Ann. Sec. 161-D:1 through 161-D:5A

*Mandatory:* Clergy are specifically named among those required to report, having reasonable cause to believe that an incapacitated adult aged eighteen or older has been subjected to physical abuse, neglect, or exploitation or is living in hazardous conditions.

*Privileges abrogated:* All except attorney-client.

**NEW JERSEY**

N.J. Stat. Ann. Sec. 52:27G-7.1 ff.

*Permissive:* Any person with reasonable cause to suspect or believe that an institutionalized elderly person aged sixty or older is being or has been abused or exploited may report.

*Privileges abrogated:* Not specified.

**NEW MEXICO**

N. Mex. Stat. Ann. Sec. 27-7-1 through 27-7-13

*Mandatory:* Any person having reasonable cause to suspect that an adult aged fifty-five or older is unable to protect him or herself and has been subjected to abuse, neglect, or exploitation shall report.

*Privileges abrogated:* Not specified.

**NEW YORK**

N. Y. Social Services Law, art. 9B, Sec. 473ff.

*Permissive:* Anyone who in good faith believes that a person aged eighteen or older may be an endangered adult may report.

*Privileges abrogated:* Not specified.

**NORTH CAROLINA**

N. C. Gen. Stat. Sec. 108A-99 through 108A-111

*Mandatory:* Any person having reasonable cause to believe that a disabled adult aged eighteen or older is in need of protective services shall report.

*Privileges abrogated:* Not specified.

**OHIO**

Ohio Rev. Code Ann. Sec. 5101.60 through 5101.72

*Mandatory:* Clergy and persons engaged in counseling are specified among those required to report immediately if they have reasonable cause to believe that an adult aged sixty or older is being abused, neglected, or exploited, or is in a condition which is the result of abuse, neglect, or exploitation.

*Privileges abrogated:* Not specified.

**OKLAHOMA**

Okla. Stat. Ann. Tit. 43A, Sec. 801 through 810

*Mandatory:* Any person having reasonable cause to believe that an elderly person aged sixty-five or older or an incapacitated adult aged eighteen or older is suffering from abuse, neglect, or financial exploitation shall report.

*Privileges abrogated:* Not specified.

**OREGON**

Oreg. Rev. Stat. Sec. 410.610 through 410.700

*Mandatory:* Clergy are specified among those who must report, if they have reasonable cause to believe that any person aged sixty-five or older with whom they come into contact while acting in an official capacity has suffered abuse, or that any person with whom they come into contact has abused a person aged sixty-five or older. (A separate law has the same provision regarding any patient in a long-term care facility.)

*Privileges abrogated:* Not specified.

**RHODE ISLAND**

R. I. Laws Sec. 42-66-1 through 42-66-11

*Mandatory:* Any person who has reasonable cause to believe that an elderly person aged sixty or older has been abused, neglected, exploited, or abandoned shall make an immediate report.

*Privileges abrogated:* Not specified.

**SOUTH CAROLINA**

S.C. Code Ann. Sec. 43-29-10 through 43-29-100

*Mandatory:* Christian Science practitioners, religious healers, and counselors are specified among those who must report if they have reason to believe that a client or patient in the care or control of any public or private agency, department, hospital, institution, or facility has been or may be adversely affected by abuse or neglect, or that such person has suffered abuse, threatened abuse, or physical or mental injury.

*Privileges abrogated:* Not specified.

**SOUTH DAKOTA**

S. Dak. Codified Laws Ann. Sec. 22-46-1 through 22-46-4

No reporting requirements of anyone; no privileges abrogated.

**TENNESSEE**

Tenn. Code Ann. Sec. 14-25-12 through 14-25-107

*Mandatory:* Any person having reasonable cause to suspect that an adult aged eighteen or older has suffered abuse, neglect, or exploitation shall report or cause reports to be made.

*Privileges abrogated:* All.

**TEXAS**

Tex. Family Code Ann. Sec. 48.001 through 48.084

*Mandatory:* Any person having reasonable cause to believe that an elderly person aged sixty-five or older or a disabled person aged eighteen or older is in the state of abuse, exploitation, or neglect shall report.

*Privileges abrogated:* Not specified.

**UTAH**

Utah Code Ann. Sec. 55-19-1 through 55-19-10

*Mandatory:* Any person who has reason to believe that any disabled adult aged eighteen or older has been subject to abuse, neglect, or exploitation shall report.

*Privileges abrogated:* Not specified.

**VERMONT**

VT Stat. Ann. Tit. 18-1152

*Permissive:* Any person who has reasonable cause to believe that an elderly person aged sixty or older or a disabled adult aged eighteen or older has been abused, neglected, or exploited may report.

*Privileges abrogated:* Not specified.

**VIRGINIA**

Va. Code Ann. Sec. 63.1-55.1 through 63.1-55.7 and 24.2.1-373.1 through 24.2.1-373.3

*Permissive:* Any person who suspects that an adult aged eighteen or older is being abused, neglected, or exploited may report.

*Privileges abrogated:* Not specified.

**WASHINGTON**

Wash. Rev. Code Sec. 74.34.010 through 74.34.900

No reporting requirements or permissions that affect clergy.

**WEST VIRGINIA**

W. Va. Code Sec. 9-6-1 through 9-6-15

*Mandatory:* Christian Science practitioners and religious healers.

*Permissive:* Any person who has reasonable cause to believe that an incapacitated adult aged eighteen or older is neglected, abused, or in an emergency situation, or who observes an incapacitated adult being subjected to conditions that are likely to result in abuse, neglect, or an emergency situation, may report.

*Privileges abrogated:* All except attorney-client.

**WISCONSIN**

Wis. Stat. Ann. Sec. 46.90

*Permissive:* Any person may report that he or she believes that abuse, material abuse, or neglect has occurred if the person is aware of facts or circumstances that would lead a reasonable person to believe that such behavior has occurred. Any person may also report self-neglect.

*Privileges abrogated:* Not specified.

**WYOMING**

Wyo. Stat. Sec. 35-20-101 through 35-20-109

*Mandatory:* Any person who knows or has reasonable cause to believe that a disabled adult aged sixteen or older is abused, neglected, or abandoned shall report.

*Privileges abrogated:* Not specified.

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## **Biography**

### **Chaplain (Major) Robert C. Lyons**

Chaplain (MAJ) Robert C. Lyons enlisted in the United States Air Force on August 28, 1974 as a Flight Simulator Specialist. After being honorably discharged in the summer of 1976, he entered the University of Tennessee. He graduated in June 1979, with a Bachelor of Arts degree, majoring in Human Services. He then attended the Divinity School of Duke University, graduating in May 1982 with the Master of Divinity Degree. In 2000, he returned to Duke Divinity School, earning the Master of Theology degree, with a major in Ethics, graduating in May 2001.

Ordained in the Christian Church (Disciples of Christ), Chaplain Lyons has extensive pastoral experience, having served congregations in Florida, Nebraska, Georgia, and Alabama.

Chaplain Lyons re-entered military service in February 1989, when he was commissioned as a chaplain in the Alabama Army National Guard. He served as Deputy Group Chaplain of the 122d Support Group (COSCOM), Selma, Alabama, and as Battalion Chaplain of the 135<sup>th</sup> Supply and Service Battalion, Jasper, Alabama.

Called to Active Duty in August 1992, Chaplain Lyons served as Battalion Chaplain, 2-17 Field Artillery (Paladin), Fort Sill, Oklahoma. From June 1995 to June 1996, he served as Battalion Chaplain with the 302d Forward Support Battalion, 2d Infantry Division, in the Republic of Korea. Returning to Fort Sill in July, 1996, he served with the 1-22d Field Artillery in the Field Artillery Training Center, and then as Staff Chaplain of the Directorate of Public Safety, where one crucial responsibility was serving as the Regional Correctional Facility chaplain.

Chaplain Lyons is a graduate of the Chaplain Officer Basic and Advanced courses, the Combined Arms and Services Staff School (CAS<sup>3</sup>), and the Army Command and General Staff Officers' Course. His awards and decorations include the Meritorious Service Medal, the Army Commendation Medal with 2 Oak Leaf Clusters, the Army Achievement Medal, and the Army Reserve Medal.

Chaplain Lyons is married to the former Martha Burton of Winter Park, Florida. Together, they have 2 sons, David and Philip.